APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 628

DANIEL JAY SCHACHT,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 22, 1969
CERTIORARI GRANTED DECEMBER 15, 1969

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

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[5] CLERK'S DOCKET ENTRIES OF CR. 67-H-239

1967

12-12 Indictment Filed.

1968

1-5 Arraignment: Plea of not guilty: (ABH)

1-29 Motion to consolidate CR-67-H-239 and CR-67-238, filed. (for trial)

1-30 Motion to quash indictment, filed.

1-31 Govt's response to Deft's Motion to Quash Indictment, filed.

2-1 Deft's Motion to Consolidate granted orally in open court; motion to quash indictment denied (JN).

2-12 Govt's requested jury instructions, filed.

2-15 Govt. subpoena to Don Benskin retd. & filed. Executed.

2-13 1st day of jury trial (JN) — Consolidated with CR-67-H-238 for trial.

2-14 2nd day of jury trial (JN).

2-15 3rd day of jury trial (JN). Order entered denying Deft's motion for instructed verdict. Verdict of guilty returned.

Order entered denying Govt's motion to increase bond of both Defts.

(In this case and in Cr-67-H-238). Order entered setting bonds of both defts. at $500 (Surety).

[6] Presentence investigation ordered.

2-15 Motion of Deft. to instruct verdict, filed.

2-15 Govt's requested interrogatories to the jury panel, filed.

2-15 Jury verdict, filed.

2-26 Defts' requested questions to the jury panel, received and filed.

2-26 Defts' subpoenas to Dwight Harris & Harry Redman retd. & filed. Executed.

2-26 Govt. subpoena to Billy Lum retd. & filed. Executed.

2-29 Sentence: 6 mos. and $250 fine. (JN). Oral motion by Deft. for a new trial. Any motions to be filed within 5 days.

2-29 Order to disburse cash bail bond, filed (JN).

3-1 Order admitting Defendant to bail in amount of $2,000 and directing him to execute surety bond in this amount (JN).

3-1 Appearance bond filed ($2,000 — Paul E. Ward, surety — cash bond).

3-4 Judgment and commitment filed (JN).

3-11 Govt's response to Defts' motion for new trial, filed (in CR-67-H-238 and CR-67-H-239).

3-14 Motion for new trial, filed (In CR-67-H-238 and CR-67-H-239).

[7] 4-12 Deft's notice of appeal, filed. (Cons. with CR-67-H-238).

4-12 Appearance of counsel on appeal, filed (in CR-67-H-238 consolidated).

4-18 Defts' motion to stay execution of sentence, filed.

4-18 Order granting stay of sentence provided amount of fines is deposited in registry, filed, (JN). (Consolidated with CR-67-H-238).

4-18 Designation of Record on Appeal, filed.

1968

2-15 Motion of Deft. to Instruct Verdict, filed.

2-15 Govt's Requested Interrogatories to the Jury Panel, filed.

2-15 Jury Verdict, filed.

2-26 Defts' Requested Questions to the Jury Panel, received and filed.

2-26 Defts' subpoenas to Dwight Harris & Harry Redman retd. & filed. Executed.

2-26 Govt. subpoena to Billy Lum retd. & filed. Executed.

2-29 SENTENCE: 6 mos. and $250 fine. (JN). Oral motion by deft. for a new trial. Any motions to be filed within 5 days.

2-29 Order to Disburse Cash Bail Bond, filed (JN).

3-1 Order admitting defendant to bail in amount of $2,000 and directing him to execute surety bond in this amount (JN).

3-1 Appearance Bond filed (2,000 — Paul E. Ward, surety — cash bond).

3-4 Judgment and Committment filed (JN).

3-11 Govt's Response to Defts' Motion for New Trial, filed (in CR-67-H-238 and CR-67-H-239).

3-14 Motion for New Trial, filed (in CR-67-H-238 and CR-67-H-239).

4-12 Deft's Notice of Appeal, filed. (Cons. with CR-67-H-238).

4-12 Appearance of Counsel on Appeal, filed (in CR-67-H-238 Consolidated).

4-18 Defts' Motion to Stay Execution of Sentence, filed.

4-18 Order Granting Stay of Sentence provided amount of fines is deposited in Registry, filed (JN). (Consolidated with CR-67-H-238).

4-18 Designation of Record on Appeal, filed.

7-9 Certified, duplicated Record on Appeal mailed to Court of Appeals. (Copy of Record filed in CR-67-H-238).

1969

2-24 Appearance Bond Pending Appeal, filed $2,000 —United Bonding Ins. Co., surety)—replacing cash bond filed on 3-1-68.

2-27 Order to Disburse Cash Bail Bond, filed (JN).

8-27 Original Exhibits returned from Court of Appeals.

8-27 MANDATE (or Judgment) of Ct. of Appeals rec'd & filed. ("AFFIRMED") (Filed in CR-67-H-238.)

8-28 (JN) Order that Defendant Surrender Himself to U. S. Marshal, filed and entered. (2 copies mailed to U. S. Marshal and 1 copy to Deft., his attorney and his bondsman) — to surrender on 9-2-69, 8:30 A.M.

9-2 (JN) Hearing on deft's oral motion that order to surrender be stayed. Motion denied. Seagoville, Texas, recommended.

9-22 Commitment rtd. & filed. Exe. 9-11-69, FCI, Seagoville, Texas.

10-1 Telegram from Clerk, U.S.Ct. of Appeal granting Appellant's motion to recall and stay mandate pending determination of petition for writ of certiorari by Supreme Court, rec'd & filed.

10-1 (JN) Order that Deft SCHACHT be brought back to Houston for a hearing under Bail Reform Act, filed. (Copies of Order delivered to U. S. Atty and to Atty for Deft Schacht.)

10-2 (JN) Application & Order for Writ of Habeas Corpus Ad Prosequendum filed and entered. Writ issued.

10-2 Deft. DANIEL JAY SCHACHT'S Application for Bail Pending Appeal, filed.

10-3 Certified copy of Order of Fifth Circuit, dated 10-1-69, for Recall and Stay of Mandate pending final disposition of petition for Writ of Certiorari filed in Supreme Court, rec'd & filed.

10-6 Mandate returned to Court of Appeals pursuant to their order.

10-6 Deft's Motion for Setting and Hearing on Application for Bail, and Order granting same, setting hearing at 9:30 A.M. on 10-7-69 (JN), filed and entered.

10-7 (JN) Hearing on deft's application for bail, entered.

10-7 (JN) Order releasing deft. on bond by deposit of 10%, filed and entered.

10-7 Appearance Bond filed (10% deposited by Ezra L. Schacht).

10-8 Govt's Memorandum regarding admission to bail pending bail, filed.

10-9 (JN) Hearing on conditions of bail, entered. Govt. to prepare modified bond.

10-9 Writ of Habeas Corpus Ad Prosequendum retd. & filed. Exe. 10-5-69 by transferring deft. from FCI, Seagoville, to Houston.

10-16 (JN) Order imposing additional conditions of bail, filed and entered.

[78] INDICTMENT OF SCHACHT

(Filed December 12, 1967)

(Caption Omitted)

The Grand Jury Charges:

On or about December 4, 1967, in the Houston Division of the Southern District of Texas, Daniel Jay Schacht, Defendant, willfully, knowingly, and without authority, and while not an officer or an enlisted man of the United States Army, did wear a distinctive part of the official uniform of the United States Army.

(Violation: Title 18, U. S. Code Section 702)

A TRUE BILL

/s/ ALAN L. DABNEY
Foreman of the Grand Jury

MORTON L. SUSMAN
United States Attorney

By /s/ JOEL P. KAY
Assistant United States Attorney

[79] DEFENDANT SCHACHT'S MOTION TO QUASH INDICTMENT

(Filed January 30, 1968)

(Caption Omitted)

To The Honorable Judge Of Said Court:

Comes now, Daniel Jay Schacht, by and through his attorneys of record, Morris Bogdanow and Milton H. Mulitz and files and presents this his motion to quash the indictment against him heretofore brought in by the Grand Jury and as grounds therefore would show the following:

I.

That the statute under which he stands indicted to-wit: 18, Sec. 702, U.S.C.A., is one which violates the First Amendment to the U.S. Constitution since it forbids and interferes with freedom of speech.

II.

That the statute in question is further violative of the Fourteenth Amendment to the U.S. Constitution, which guarantees the equal protection of the law since it is in conflict with another statute with regard to the wearing of the uniform to-wit: 10, Sec. 771 to 774, U.S.C.A., which [80] permits the wearing of the uniform under certain occasions to-wit: By honorably discharged Army, Navy and Marine Corps officers, regular or volunteers, on ceremonial occasions, whereas discharged enlisted men can only wear the uniform for a period of three (3) months after their discharge while traveling from their place of discharge to home and prohibits the wearing of the uniform or any significant part thereof to civilians; which treatment of a different nature as between officers,

enlisted men and civilian personnel is wholly discriminatory and a denial of the equal protection of the law clause as guaranteed in the Fourteenth Amendment of the U.S. Constitution.

III.

Further that this statute in question conflicts with the other mentioned statute to-wit: 10, Sec. 772 (F) U.S.C.A., whereby the wearing of the uniform by anyone in any play house or theater or motion picture film while representing therein a military or naval character provided it does not tend to bring disgrace or reproach on the U. S. Army, Navy or Marine Corps; this sub-section permitting the wearing of the uniform, if used for dramatic portrayals and only if it does not tend to bring discredit or reproach on the U. S. Army, Navy or Marine Corps is [81] a distinct infringement on defendant's right or free speech as guaranteed by the First Amendment to the U. S. Constitution, since there is no determinative measuring rod as to what constitutes discrediting or reproaching of the U. S. Army, Navy or Marine Corps and this defendant would respectfully call to this Court's attention such dramatic portrayals as *"No Time For Sergeants"* — *"Sergeant Bilko"* — *"The Caine Mutiny"* — *"Dr. Strangelove"* — to mention just a few of the recent satirical famous portrayals of military individuals and military and naval procedures which have graced our film, television and theater in recent years. Are we to say that only big play producers, movie moguls or television networks may make fun of the U. S. Army or Navy, but an individual cannot portray "a soldier or sailor" unless what he attempts to say is popular with the self-appointed censor? Who says this is verboten, ala Hitler? Who gives the measuring rod that is to determine what is or is not disgraceful? Freedom of speech cannot be confined to

those causes or persons whose ideas we agree with, it must apply to all alike.

This statute in question by failing to set forth standards, which is to determine what is and what is not disgraceful and by what means this is [82] to be determined in a criminal statute is a discriminatory, capricious attempt by the U.S. Government to charge a person with a crime without setting out any definite standards or limitations to apprise the defendant of the full particulars of what the crime consists of, and such a statute has frequently been held by the courts of the United States to be wholly void and unenforceable on the grounds that it is vague, indefinite and uncertain. It is a fundamental rule of Anglo-American jurisprudence, that for a person to be charged as a defendant in a court of this land that he be fully apprised of the nature of the offense and all particulars thereof, in order that he may be able to fully prepare a defense or defenses thereto.

IV.

Further this statute in question is being used to charge this defendant with a crime, yet this crime fails to be clearly defined since the statute in question states that no one shall wear a "uniform or any significant part thereof." Who knows what is a "significant part of a uniform"? Does it mean that the major portion of the uniform must not be worn? Does it mean that the shoes must not be worn, the tie must not be worn, the cap must not be worn, the blouse must not be worn, or what combination [83] of any of these things need be worn by the defendant to constitute a crime? As stated above in the preceding paragraph, a criminal statute must, of necessity, state clearly, and definitely the person charged with a crime must be fully apprised of the nature of the offense which he is charged by the statute itself, and un-

less the statute definitely states that doing or committing a particular act and/or acts in a way definitely stated, the statute is vague for indefiniteness and uncertainty and must be held unconstitutional and unenforceable.

V.

The statute in question states no legislative purpose in its preamble and counsel for defense made a diligent effort to determine the exact legislative purpose and intent behind this legislation or the legislation which it replaced. As the statute is written, both the court and jury will have to engage in a magnitude of presumptions to enable them to determine what, if anything, was the legislative intent and purpose. Was this prohibition of the wearing of the uniform to prohibit the ease of movement by a spy in war time? If this is so, are we at war? When has Congress declared war? Who has the power to declare war? By all of the constitutional standards, the [84] United States is not at war at this time, and at the time of the alleged commission of the offense, for Congress has not officially declared war and the United States Constitution specifically states that "Congress alone shall declare war." Was the legislative intent to prohibit the wearing of uniforms by unauthorized personnel to prevent a person from using the uniform as a means of "bilking" the public out of potential donations to Army, Navy or Marine relief? There is no showing that this was or was not the intent of Congress. The only apparent intent of the legislation as written and as enforced seems to be to prevent freedom of speech on the part of the defendant or others like him from attempting to portray a military person in a *"street play"* and using this method as a protest against the draft and against our military actions in Vietnam. If this is the purpose, and if this is the way this law is to be applied, then this defendant has only one

conclusion to draw and one claim to make, namely that his rights of free speech have been infringed upon and that this statute is a direct violation and contravention of the First Amendment of the U. S. Constitution.

WHEREFORE, PREMISES CONSIDERED, defendant prays that his motion to quash the indictment [85] against him be granted.

Respectfully submitted,

/s/ MORRIS BOGDANOW
Morris Bogdanow

/s/ MILTON H. MULITZ
Milton H. Mulitz
Attorneys for Defendant
Suite 411 Melrose Bldg.
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[100] PROCEEDINGS

February 13, 1968

(Opening statements waived by all counsel.)

EDWARD G. STORK,

called as a witness in behalf of the Government, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Hartman:

Q. Your name, sir?

A. Edward G. Stork, S-t-o-r-k.

Q. Where do you live?

A. 6509 Stroud Drive, here in Houston.

Q. Your occupation?

A. Special agent for the Federal Bureau of Investigation.

Q. How long have you been so employed?

[101] A. Seventeen years.

Q. You are stationed where?

A. Houston, Texas.

Q. What are your duties?

A. To investigate violation of the laws of the United States.

Q. Do you know these two defendants in this courtroom?

A. Yes, sir, I do.

Q. How well do you know them?

A. I had occasion to view them on December 4, 1967.

Q. Here in Houston, Texas?

A. Yes, sir.

Q. Had you seen them before that time?

A. No, sir, I had not.

Q. Will you tell us where they were and about what time it was when you first saw them?

A. On December the 4th, in front of the Induction Station at 701 San Jacinto, about 6:30 in the morning. They were in front of the Induction Station, the old post office building, which is now called the United States Customs Building, I believe.

Q. How were they dressed?

A. Mr. Jarrett was dressed in a portion of the uniform of the United States Army as was Mr. Schacht.

[102] Q. Mr. Jarrett—

A. Smith.

Q. Tell us which one is Smith.

A. Mr. Smith is the one at the end of the table and Mr. Schacht is the gentleman closest.

Q. Which one did you notice first?

A. Mr. Smith.

Q. Tell us how he was dressed.

A. He had on a jacket of the current issue of the United States Army jacket, and was carrying in his hand a garrison hat.

Mr. Mulitz: I object to that answer of the current issue. He is not qualified to testify as to whether or not that particular jacket was a new issue or an old. It is purely a conclusion.

The Court: I sustain that.

Q. (By Mr. Hartman) Would you just describe the jacket he had on when you saw him?

A. A green jacket with the brass buttons of the type issued associated with military uniforms.

Mr. Mulitz: We object to that as purely a conclusion.

The Court: Sustain the latter [103] part of the objection and the motion to strike.

Q. (By Mr. Hartman) Let me ask you, did—

The Court: Let's don't compare. Just describe.

Q. (By Mr. Hartman) Did the blouse or jacket have buttons?

A. Yes, sir.

Q. Did they look like they were brass?

A. Yes, they looked like they were brass.

Q. Did the buttons have an insignia on them?

A. Yes, sir.

Q. Each button?

A. Yes, sir.

Q. Were you close enough to observe the buttons to tell us what it was?

A. The insignia was the spread eagle.

Q. Any other clothes?

A. Civilian pair of slacks.

Q. How about his hat?

A. It was of the same material as the jacket. The color was the same.

Mr. Multitz: If the court please—I hate to keep interrupting—but the indictment alleges a single [104] distinguishing part of a uniform. I think the Government is bound by the indictment of what they sought to prove. A distinctive part of a single uniform, and not the entire uniform.

The Court: Overruled.

Mr. Mulitz: Note our exception.

Q. (By Mr. Hartman) Did he have a hat on?

A. He had it in his hand.

Q. Describe the hat he had in his hand when you first saw him?

A. The hat was a flat green material.

Q. All right.

Did it have a chin strap?

A. No, sir, it didn't.

Q. Did it have any buttons or anything else on it?

A. No, sir.

Q. Any insignia on it?

A. No, sir, it didn't.

Q. How long, as a matter of time, did you observe that man there?

A. Just a short period of time.

Q. I see.

A. Ten, ten seconds.

Q. Let's go to the other defendant, Schacht.

[105] Did you observe the clothing he was wearing?

A. Yes, sir.

Q. Tell us your best recollection what he was wearing. Describe the clothing.

A. The clothing was green in color. It was a jacket, a pair of pants, and a cap of a khaki color. It had the chin strap hanging down, and there were brass-type buttons on the jacket.

* * *

[121] Q. Yes. What was he doing at the time you observed him in the demonstration at the induction center?

A. Parading back and forth at the induction center.

Q. Parading back and forth?

A. Yes, sir.

Q. How many were participating in the demonstration there at the induction center?

A. The exact number, I don't know, but there were several.

[122] Q. Several. Isn't it a fact, Mr. Stork, Mr. Schacht was putting on a theatrical satire or play in front of the induction center that morning?

A. I will have to give you an opinion.

Q. I'm not asking for an opinion. I'm asking whether or not he was putting into effect a theatrical satire or play in front of the induction center that morning?

A. He and several others were running around with water pistols and squirting everybody with colored fluid.

Q. All right. Wasn't there a person dressed in a familiar type of Asian hat and a black robe?

A. Yes, sir.

* * *

[130] Q. Let's refresh our memory, Mr. Stork, and go back to the morning of December 4.

You saw both Smith and Schacht together there, didn't you?

A. Yes, sir.

Q. One wearing that particular cap there, is it not so?

A. Yes, sir.

Q. And another person wearing that black robe and that straw hat which has been introduced into evidence?

A. Yes, sir.

Q. Isn't it a fact Mr. Schacht and this other person who you don't know—isn't it correct you don't know?

A. No, sir.

Q. —were portraying a theatrical act there in front of the induction center?

A. I would consider it a demonstration, not a play as I know a play.

Q. It could have been a play, could it not?

A. It would depend on your opinion.

[159] BILLY GENE LUM,

called as a witness in behalf of the Government, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Kay:

Q. State your name.

A. Billy Gene Lum.

Q. Are you the same Mr. Billy Lum who was previously sworn in this courtroom this morning?

A. Yes, sir.

Q. Where do you live, Mr. Lum?

A. 8303 Winkler Drive.

Q. By whom are you employed?

A. Houston Police Department.

* * *

[162] Q. Was there anything unusual that occurred in or about the grounds of the Induction Center during the period of time you were there?

A. Yes, sir, there was.

Q. What?

A. Well, there was the defendant chasing another person with a water pistol filled with red ink.

* * *

[163] Q. (By Mr. Mulitz) I want you to look at Defendants' Exhibit Number 1 and Defendants' Exhibit Number 2.

I will ask you if you saw any person or persons wearing those two Exhibits when you were present there at the Induction Center?

A. Yes, sir, I did.

Q. Who was wearing that?

A. There was another person — I don't know his name — that was wearing the hat, and I believe this robe — there was a third person, if I am correct, that was wearing this.

Q. And Mr. Schacht was with those two persons, was he not?

A. Yes, sir.

Q. And they were play-acting? Mr. Schacht and those two persons were play-acting?

A. They were chasing each other. I don't know.

Q. In their hands was what?

A. A small water pistol filled with liquid I presumed to be ink.

* * *

[170] J. EDMUND MCKEE,

called as a witness in behalf of the Government, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Day:

Q. State your name.

A. J. Edmund McKee.

Q. Are you the same J. Edmund McKee previously sworn in this courtroom this morning?

A. I am.

Q. Where do you reside?

A. Here in Houston, Texas. Do you want the specific address?

Q. No. By whom are you employed?

A. The United States Army.

Q. What is your rank?

A. Lieutenant Colonel.

Q. How long have you been in the United States Army?

A. Over twenty-five years.

Q. What is your present assignment?

A. I am Commanding Officer of the Armed Forces, [171] examining at the entrance station at Houston, Texas.

Q. Where is your office located?

A. 701 San Jacinto, Houston, Texas.

Q. Describe in general terms your duties in this assignment.

A. It is my responsibility for the operation of what is commonly called the Induction Center. We receive general applicants for the Army, Navy and Air Force and Marine Corps for process, and enlisting into the service.

Q. Were you in your office on December 4, 1967?

A. I was.

Q. Did you observe at that time any occurrence outside of your office?

A. I did.

Q. What did you observe?

A. I observed that morning a number of people, both male and female, in the area in front of the building, on the sidewalks and up to the steps passing out what appeared to be literature of some sort.

Mr. Mulitz: We object to what appeared to be. It could have been blank pieces of paper, your Honor.

The Court: The witness said what appeared to be literature. I will [172] overrule the objection.

The Witness: I was handed copies of these papers that were handed to persons entering the station, and I examined them and found them to be printed matters of some type. Some people carried placards. Some people were in costume — well, other than normal dress for the time.

Q. (By Mr. Kay) Do you know the Defendant Danny J. Schacht?

A. I do.

Q. Would you point him out here in the courtroom?

A. Yes, sir. He is the third man from the front, the one with the dark glasses, and his hand at his chin.

Q. Did you see this Defendant at the time in front of the Induction Center on December 4, 1967?

A. I did.

Q. How was this Defendant dressed?

A. He was dressed with part of the currently authorized army uniform.

Mr. Mulitz: We object to that. It is purely hearsay. It is a question for the jury to say whether it is a —

Mr. Kay: I will rephrase my [173] question, if your Honor please.

The Court: Very well.

Q. (By Mr. Kay) Colonel, just, in specific terms, starting with the man's head, what did he have on? Describe it in detail, not whether or not it is authorized or not.

A. On his head he had the fur felt Army officer's cap with the strap loose and hanging down, and with an army officer's insignia upside down.

On his body, this portion, he had an army green

shade 44 enlisted blouse with a U.S. Army Europe patch on the left shoulder.

Q. Was this blouse the same color as the blouse you now have on?

A. It was.

Q. I show you, sir, Government's Exhibit 7.

Does this appear to be the cap which Mr. Schacht had on?

A. It does.

Q. Is it the same color as the cap which Mr. Schacht had on?

A. It is.

Q. Now, sir, did you happen to see the buttons that was on the blouse?

A. I did.

[174] Q. And did they look in any way similar to the buttons you now have on your blouse?

A. They were exactly like the ones I have on my blouse.

Q. Will you describe specifically those buttons?

A. This is a metal button with the United States Army insignia with the eagle and so forth worn on much of our insignias, and they are identical of Army personnel.

Q. Would you state, please, whether or not you are authorized to wear that uniform in the courtroom today?

A. I am.

Q. Why is that?

A. Because I am on official duty.

Q. You are presently a member of the military?

A. That's correct.

Q. Could you have worn any other type of uniform today?

Mr. Mulitz: We object. We think it is immaterial and irrelevant. I think it has no bearing.

Mr. Kay: I will withdraw the question, your Honor.

Q. (By Mr. Kay) Do you know, sir, whether or not the uniform you now have on is a currently authorized uniform?

[175] A. It is.

Q. Is this the currently authorized color of the uniform?

A. It is.

Q. Was it currently authorized on December 4, 1967?

A. It was.

Q. And is it correct, or did you say previously, the color of the uniform you have on now is the same as the one that was worn by Mr. Schacht?

A. That's correct, it is.

Q. And the buttons were the same?

A. That's correct.

Q. Now, at the time you saw Mr. Schacht, did you recognize him as Mr. Schacht?

A. I did.

Q. Why did you recognize him?

A. I remember Mr. Schacht from having been in my Station in January of 1967, for induction processing, and I did recall him at the time. He was pointed out to me as being Mr. Schacht, and saw him on several occasions during the period of time he was there, and I recall him when seeing him again on December 4.

* * *

[176] Colonel McKee, are you familiar with the Army Regulations prescribing the authorized military uniform, particularly the Army?

A. Yes, I consider myself familiar.

Q. Were you familiar with those Army Regulations on December 4, 1967?

A. I was.

[177] Q. At the time you saw Mr. Schacht in front of the Induction Center, could you see whether or not the blouse being worn by Mr. Schacht was an authorized blouse to be worn by an enlisted man at that time?

A. The blouse I saw on Mr. Schacht was the Army Green Shade 44 blouse. It was then and is now authorized.

Q. What about the inverted eagle on the cap?

A. That is the current insignia worn.

Q. What about the buttons on the blouse?

A. They were the current authorized buttons.

* * *

[180] Q. Did you see any person or persons wearing any costumes out there?

A. I saw persons wearing clothing, one man with a cape and a flat cap.

Is that what you want, sir?

Q. Colonol, let me show you this black robe and this hat.

You had a good, clear sight, and observation, of what was going on out there?

This is just a common, ordinary bamboo hat. Did you see any person wearing that that morning?

A. Yes, sir.

[181] Q. Do you know what this is, Colonel?

A. It looks like a black piece of cloth, sir.

Q. Just a piece of cloth. When I open it up, sir, can you tell me what it is?

A. A cape of some kind, sir.

Q. Does it look like a choir robe, worn by members of a choir?

A. It could be. I don't know, sir.

Q. And, did you see a person wearing that out there that morning of December 4th?

A. Yes, sir.

Q. And, did you see any other type of costume that was being worn by any other person or persons out there?

A. As I stated before, I saw someone with a rather full cape and a black cap.

Q. What was that person doing?

A. Mingling around with the rest of them.

Q. Did you see Mr. Schacht and the person wearing that cape and cap there together?

A. Yes, sir.

Q. What were they doing?

A. Occasionally they were chasing each other around and apparently had a water pistol.

Q. Portraying an act?

A. Looked like a demonstration to me, sir. I don't [182] know whether it was an act or not, but it didn't appear to me to be.

[218] DENNIS G. PEREZ,

called as a witness in behalf of the Government, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Kay:

Q. State your name.

A. Dennis G. Perez.

Q. Are you the same Mr. Perez who was in the courtroom yesterday and was sworn?

A. I am.

Q. What is your address?

A. 922 West Mariposa Drive, San Antonio.

Q. By whom are you employed?

A. Department of the Army, Fort Sam Houston, Texas.

Q. For how long?

A. Seventeen years.

Q. What is your position in your employment at Fort Sam Houston, Texas?

A. I am the Store Manager of the United States Army Clothing Store.

Q. How long have you worked in the Store there?

[219] A. Seventeen years.

Q. Would you state your position at the store, please?

A. I am in charge of operations of sales to Military Personnel. By that, I mean, reserves and retired personnel from the Armed Forces, reserve personnel on base status, inactive duty.

In general, military personnel of the Armed Forces with proper identification, as such.

Q. You say the people who buy from your store must present to you proper identification?

A. Yes, sir.

Q. To identify them as what?

A. Their rank and status.

Q. In other words, you can't sell to everyone.

A. No, sir.

Q. To whom can you sell to?

A. Any non-commissioned officer, any enlisted personnel, warrant officers and reserve personnel. Like I said, on pay status, weekly drill on pay status from the reserve program.

Q. Describe, in general, the type of merchandise you have.

A. Consisting of individual clothing—I mean, the military clothing, only, that is worn by the United States Army.

[220] Q. Where is this merchandise, in general, procured by you?

A. We order it directly from the Defense Supply Agency in Philadelphia.

Q. Would it be correct to say if they don't have it, you can't get it?

A. Right. If I don't have the issue item—without the issue item—they can't get it from me if I don't have it. But, they can go to a commercial source and purchase it. We have quite a few in San Antonio.

Q. All right. Mr. Perez, are you familiar with Army Regulation 670-5?

A. Yes, sir.

Q. Would you describe just, in general, what, to you, Army Regulation 670-5 prescribes, as you understand it?

A. I would consider that that—I mean, all my regulations of what the proper uniform of the United States Army is, both male and female, their insignias and apparatus, and how it is worn in general.

Q. In other words, you are familiar with the provisions of the Army regulations?

A. Right.

Q. Now, can you handle merchandise which are not within [221] the specifications of the types of apparel described in Army Regulation 670-5?

A. No, I can't.

Q. Were you familiar with the provisions of Army Regulation 670-5 on December 4, 1967?

A. Yes, sir.

Q. All right, sir. I would like to show you some photographs, and I would like for you, sir, to presume that the color of the blouse you see in these photographs is the same color as that pair of trousers.

Mr. Bogdanow: I am going to object to that. I don't know where he gets a presumption.

Mr. Kay: I have qualified this man as an expert, and I can give—

Mr. Bogdanow: I think the Government should prove this is a particular color that is army color, what shade, army shade, and army merchandise.

The Court: I will overrule the objection.

Q. (By Mr. Kay) Now, sir, I will show you Government's Exhibit Number 9, and assuming the color of the blouse to be that of the trousers, can you tell me [222] whether or not on December 4, 1967, that was an authorized United States Army blouse?

A. It was.

Q. And, I show you Government's Exhibit 5, a photograph, and ask you the same question.

Was that, assuming the color of the blouse to be the same as the trousers, an authorized Government Army blouse at that time, December 4, 1967?

A. Yes, sir, it is.

Q. Now, I will call your attention back to Government's Exhibit 9, and ask you to observe the buttons on that blouse.

Are those appropriate, authorized buttons to be worn on an Army uniform on December 4, 1967?

A. They are.

Q. I ask you to look at the emblem on the cap being worn, portrayed, depicted, in Exhibit 9, and ask you whether on December 4, 1967, it was an authorized emblem to be worn on an Army cap?

A. Yes, sir.

Q. Would it be an enlisted man or officer's, or both?

A. Officer's.

Q. Officer's only?

[223] A. Yes.

Q. Now, Mr. Perez, I show you Government's Exhibit 2.

Do you recognize the patch on the shoulder depicted in that picture?

A. Yes, sir.

Q. Will you describe it?

A. It is the European Command patch.

Q. Was it authorized to be worn on the uniforms on December 4, 1967?

A. Yes, sir.

Q. It was. Excuse me.

Mr. Perez, I show you Government's Exhibit Number 1, and assuming that the blouse in that picture is the same color as those trousers before you, is that an authorized Army blouse which was authorized to be worn on December 4, 1967?

A. Yes, sir.

Q. Can you tell from the photograph whether or not the buttons are also authorized?

A. The buttons are authorized with the exception it looks like the top button is unbuttoned or missing.

Q. All right. Thank you, sir.

Now, I show you, sir, Government's Exhibit Number 6, and ask you—excuse me—strike that.

[224] I will ask you, assuming the color of that blouse to be the color of the trousers before you, whether or not that was an authorized Army blouse on December 4, 1967?

A. Yes, sir.

[243] HARRY REDMAN,

called as a witness in behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bogdanow:

Q. State your name.

A. Harry Redman.
Q. What do you do?
A. I'm in the uniform business.
Q. Where is your place of business?
A. 1011 Main Street.
Q. How long have you been in this business?
A. Forty years.
Q. Is that military uniforms?
A. Yes, sir.
Q. Are they available for sale to the public?
A. Yes, sir.
Q. I mean, does a person have to prove he is a member of the armed forces to buy a uniform?
A. No, sir.

[264] MICHAEL HUDGINS,

called as a witness in behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bogdanow:

Q. Would you state your name?
A. Michael Hudgins.
Q. What do you do?
A. Reporter for the Houston Post.
Q. On the date, December 4, 1967, as part of your assignment for the Post, did you see anything unusual happen at the Induction Station in Houston?
A. Yes, sir.
Q. What did you see?
A. I arrived there at 6:40 to cover a demonstration that broke up at approximately 8:30.

Q. What did you see at that place?

A. I counted nineteen people at the time I arrived who were in the demonstration. The first part I saw was the marching up and down with placards, anti-war placards.

[265] I arrived at 6:40, somewhere close to 7, and I saw the first of one of these skits take place where Mr. Schacht and another boy chased a third boy up and down the sidewalks.

Q. What was the nature of the skit?

A. Schacht had on a uniform with a cap. The second boy had on a—looked like coveralls of some type, maybe military-colored coveralls, and the third boy was dressed up as a Viet Cong, or supposedly, with the coolie hat and cape.

Q. You saw this more than once?

A. I counted three or four times.

Q. Did they say anything?

A. Yes. One would say, "Be an able American," and they would shoot the Viet Cong, and he would fall to the pavement, and they would walk up to the third person and kick the cape aside and say, "My God, this is a pregnant woman."

Q. That was repeated several times?

A. Maybe three times.

Q. As a newspaper reporter, you say this was a skit?

A. I couldn't qualify it. I interviewed as many people as I could.

Q. Did you characterize it as a skit?

A. What is your definition of the word skit?

[266] The Court: He just testified he was a part of the demonstration, sir, so characterized and reported.

Do you want to cross examine.

Q. (By Mr. Bogdanow) Did you see Mr. Schacht when you first arrived at the place?

A. At 6:40?

Q. Yes.

A. No, not until the skit began. I didn't notice him.

Q. When did you first notice him?

A. When the skit began the first time.

Q. When this shooting at this Viet Cong—

A. Yes, sir. There were shouts along with it, and that's when I noticed it.

Q. Anybody else in any sort of costume?

A. Yes, sir.

Q. What sort?

A. Only as I recall, now, there was one in a black cape with a sign, and he had some type of—some type of whiskers, and he looked rather Chinese, and I don't recall.

There wasn't any more military that I remember.

Q. These so-purported military personnel, were they in full Army uniform?

[267] A. This deal with Schacht and the other boy?

Q. Right, the defendants in this case.

A. The only thing I noticed—I am now aware of a full military uniform.

I noticed Schacht's uniform was open at the neck and the cap insignia was upside down.

Q. Was the cap on his head properly?

A. Not all the time.

Q. Did you notice him doing any saluting?

A. Yes, sir.

Q. How did he salute? Was it an accepted Army salute?

A. I don't know that.

* * *

By Mr. Bogdanow:

Q. Did you notice anybody with their face made up in any way?

A. Yes. There was a—I can't remember this [268]

distinctly, but it seems the person portraying the Viet Cong person was painted on the face and it looked like blood.

Q. You also said the man with the flowing cape had some kind of make-up?

A. I don't know whether it was something he had grown or not. It looked oriental.

* * *

[269]

Q. (By Mr. Kay) Mr. Hudgins, this running around and shooting the water pistol, you say this happened about three times?

A. Yes, sir.

Q. How long did it last?

[270] A. Two and half or three minutes.

Q. No longer?

A. No longer.

Q. Did I understand you correctly to say they ran over one another and the one with the cape and the Coolie cap was pushed down?

A. Would fall.

Q. And that was it?

A. Yes.

Mr. Kay: I pass the witness, your Honor.

EXAMINATION BY THE COURT

Q. What material was in the little gun, if anything, the water gun, so to say?

A. I didn't see any evidence of this. Maybe I wasn't that near it.

Q. You didn't see any instrument in the hand of Mr. Schacht?

A. I saw the water pistol only.

Q. You have testified about three people who were dressed in unusual clothes, one, Mr. Schacht, partly in uniform, and the other one with the so-called Coolie hat, which you characterized as a Viet Cong [271] woman, and the third person was the one in this picture, the one with the black hat on.

A. No.

Q. Am I wrong?

A. Yes. The boy identified himself to me — I interviewed him — as Bill Watson. I didn't see him in those pictures, I don't think.

Q. It seemed to me you referred to three people.

A. The three participating in the skit with Schacht. This boy who identified himself to me as a Bill Watson, and the person who played the Viet Cong woman.

These people were around and about, but they were not in the skit.

Q. You mean two around and about other than the three engaged in the skit?

A. That's right. They are holding the placards and what not.

* * *

[274] DOUGLAS BERNHARDT,

called as a witness in behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bogdanow:

Q. Will you state your name, please?

A. Douglas Bernhardt.

Q. What do you do?

A. Student at the University of Houston.

Q. How old are you, Doug?

A. Nineteen.

Q. Were you present at the — were you part of the performance in front of the San Jacinto induction station?

Mr. Hartman: This is the witness, and he is starting off leading him. We would like the Court to instruct counsel not to let him ask leading questions.

The Court: Sustained.

Q. (By Mr. Bogdanow) Were you present at the Main [275] Induction Station at San Jacinto and Rusk on the morning of December 4, 1967?

A. Yes, sir, I was.

Q. What, if anything, did you do there?

A. I was part of a performance that went on at the Induction Station. I portrayed a Viet Cong in our skit.

Q. A Viet Cong in this costume?

A. Yes, sir.

Q. Now, you wore this all through the time you were there?

A. Yes. Within a couple of minutes after I got there, I put on the robe and hat and had it on all during the skit.

Q. You say you had a performance.

Had you practiced this performance?

A. Yes. We did it once for the Humanists. That is a student group on the University of Houston Campus. We were showing it to see what they thought of it.

Q. When was this?

A. A couple of days prior, may have been one day.

Q. How many times did you rehearse this performance?

A. It was — we just more or less knew what we were going to do, and performed it once in front of the Humanists. There really wasn't much dialogue that [276] had to be rehearsed.

Q. You performed this outside on the sidewalk in front of the Induction Center?

A. Yes, sir.

Q. How many times did you do that?

A. Almost all the time it was there.

Q. What was the nature of this performance?

A. As I said, I was a Viet Cong. Danny Schacht — not virtually — Danny was a soldier with a couple of other people, and they chased me around and knocked me down and shot me with a water pistol.

See the red on here? It was supposed to be blood. It was a satire or something on the service, military action that someone takes in Vietnam.

Mr. Hartman: We object to this. He is getting off and starting to categorize again, particularly about the word satire.

We want him to tell us what the people said to him while he was on the ground.

The Court: I sustain that.

Whatever you think the performance was, tell the jury what you did.

[277] I am sustaining the objection to his question. In answering, simply just explain what you did, and you may explain what the red ink was intended to be from your standpoint.

The Witness: The red ink was intended to be blood. My part was to portray a Viet Cong getting shot up by

a serviceman. That is what I was there for and trying to show.

Q. (By Mr. Bogdanow) Were they chasing you around the block?

A. In front of the induction station. We ran all over, back and forth.

Q. And you did this continuously from 6 to 8:30?

A. Just about.

Q. How long would the so-called performance take place?

A. From one and half or two hours.

Q. I mean, how long did each individual skit take place?

A. More or less a continuous thing. I would be chased and kicked, and then we would take a breather for a couple of seconds, and continue on, pretty much a continuous thing.

Q. A repetition of the same type of performance?

[278] A. Pretty much so, with different comments being made.

Q. Who was this Bill Watson fellow?

A. I know Bill Watson.

Q. What was he doing?

A. He was another soldier, supposed to be.

Q. Where is Bill now?

A. I don't know.

Mr. Bogdanow: No further questions.

CROSS EXAMINATION

By Mr. Hartman:

Q. How old are you, sir?

A. Nineteen.

Q. University of Houston?

A. That's right.

Q. You rehearsed this part of your running around playing a Viet Cong, you say?

A. That's right, in front of the humanists, a rehearsal trying to get their opinion.

Q. How many times?

A. That one time.

Q. When was this?

A. It was on a Sunday, I remember that.

[279] Q. Can you give me the date, month and year?

A. December 3rd, 1967.

Q. I see.

A. Approximately 2 P.M.

Q. Who were some of the people that witnessed this rehearsal?

A. Mr. Harry Haskin.

Q. Who is he?

A. A neighbor, a member of the humanists.

Q. What is his address?

A. The same as Jarrett's.

Q. Who?

A. The same as Mr. Smith's. I don't know the number. I don't remember it. It is on Anita.

Q. He was a member of what?

A. The Humanists.

Q. Humanists?

A. That's right.

Q. Who else witnessed this?

A. I don't remember specific names offhand. There were approximately ten, fifteen people in there.

* * *

[282] Q. (By Mr. Hartman) Tell us the purpose of the demonstration.

A. The purpose of it, as I think I said before, was to try to show some of the actions which we felt wrong.

Q. We? You mean Mr. Smith, Mr. Schacht and you?

A. Danny and I, at least, and a couple of others that took part.

[283] Q. What was it you were trying to show was wrong?

A. Some of the more inhuman aspect American soldiers carry towards the Vietnam.

Q. What are those aspects?

A. As we portrayed them.

Q. I want to know what aspects you are talking about.

A. For instance, the torture of civilians, disrespect.

Q. You were trying to show the United States soldiers tortured civilians?

* * *

[293] Q. What you and Mr. Schacht were doing — was it your intention to reflect approval of the Army?

A. What we did was to show disapproval.

Q. Was your purpose to show credit to and approval of the Army?

A. Not in their action in Vietnam at the present time, no.

Q. Was it your purpose to discredit what the Army was doing as you understood it?

A. Yes. I mean, I don't know if it is an established policy, if we were criticizing an [294] established policy. It was an action which I was going on.

Q. You believed those things were happening?

A. Yes.

Q. Was it your purpose to discredit the Armed Forces and, particularly, the Army in the eyes of the people that witnessed the demonstration?

A. The Army's action.

Q. Was it or not your purpose?

A. It was my purpose to discredit their actions. That was my purpose.

* * *

[316] DANIEL J. SCHACHT,

called as a witness in his own behalf, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bogdanow:

Q. State your name, please.

A. Daniel J. Schacht.

Q. How old are you, Dan?

A. Twenty-two.

Q. Where do you live?

A. 1620 West Main Street, Houston.

Q. Have you lived here all your life?

A. Right.

Q. You are the defendant in this lawsuit, one of the defendants in this lawsuit, and you are charged with having been wearing a significant part of the United States Army uniform.

Can you tell this court and jury what you were doing on December 4, 1967, in the morning?

A. We were completing our plans for a dramatic production.

Q. At 6:30 in the morning you arrived at the induction [317] station.

What did you do?

A. We put on the necessary equipment in order to costume ourselves for our action.

Q. Now, had this action or this play you would put on on the sidewalk, had this been rehearsed and discussed beforehand?

A. It had been given the necessary preparation. We had rehearsed it once, discussed the dialogue, sat down and written what we had considered to be the foundation for our play.

Q. You say you rehearsed one time. Where?

A. In front of the Humanists Association.

Q. At the University of Houston?

A. Right, University of Houston.

Q. Did you also publicize this intended skit to anybody else?

A. We did. We mentioned it, I believe, Thursday, the previous Thursday, at the Students For Democratic Society meeting at the University of Houston. It was brought up there for the purpose of discussion, the availability of people to participate in this action, and a number of people volunteered.

The Court: Are you talking about the demonstration or your personal [318] activity?

The witness: I am talking about personal activity on the previous Thursday.

Q. (By Mr. Bogdanow) The Judge means your personal activity or demonstration.

The Court: Were you seeking to get people to join in the demonstration or to join with you in your individual part?

The witness: In the particular production we were putting on, the play we were putting on.

In other words, we were asking for people to help us in that, for the procurement of the necessary equipment.

Q. (By Mr. Bogdanow) You knew about the demonstration coming off that day?

A. I knew there was a nationally coordination demonstration.

Q. And, as a part of that, you intended to put on this skit?

A. Yes.

Q. And you rehearsed it once before the Humanist Society?

[319] A. That's correct.

Q. And then you came along and played it on the sidewalk in front of the induction center?

A. That's correct.

Q. It has been testified here you were wearing a significant part of a uniform. You have seen the pictures here.

Were you wearing that?

A. I was.

Q. Were you in anywise properly dressed as a military man?

A. It's inconceivable.

Mr. Hartman: I don't believe he is qualified to answer that.

The Court: Sustained.

Q. (By Mr. Bogdanow) What were you wearing?

A. I was wearing, from the bottom up, a pair of civilian boots, green civilian pants, a belt with a silver buckle, regular shirt, dress green, rank insignia, United States Army removed, no lapels, and the obsolete hat, World War II hat. The insignia was upside down and one strap was dangling.

Q. And you and Jarrett Smith were wearing those uniforms?

A. I was wearing that uniform.

[320] Q. Have you seen the pictures that were shown as exhibits? Do these photographs represent you and Jarrett?

A. Yes, sir.

Q. Now, you have been to college, haven't you, Danny?

A. I have about a year at Rice University.

Q. Do you know what the word satirize means?

A. I do.

Q. Did you consider what you were doing a satire?

A. I did.

Q. Was the purpose to discredit the United States Army, or was the purpose to satirize the actions of the United States?

A. My purpose was to portray it realistically as a satire, but really I didn't realistically see any statement we did in the play would be founded on things I read in the past.

[330] Q. What was your purpose for doing this?

A. To make it clear exactly what was happening in the war in Vietnam in the form of a dramatic production, so those being inducted in the Army can clarify in their minds the actual activities in Vietnam which was killing people.

Q. Is this some of your dramatic production? Is this one of the photographic portrayals on the street in front of the induction center?

A. That is when I was in the wing.

Q. Does this portray you in portraying drama?

A. Portrays me standing there.

Q. Let's show you this one. You have the cap on lopsided, and the strap hanging down.

Is this the drama you were talking about?

A. That's not part of the drama.

* * *

[334] Q. (By Mr. Hartman) The drama you were trying to expose, was it to show your disapproval of the United States Army's involvement in Vietnam?

A. That's correct.

* * *

COURT'S CHARGE TO THE JURY

* * *

[396] Each indictment charges a violation as denounced in the law which is cited as 18 United States Code, Section 702, which reads as follows:

"Whoever, in any place within the jurisdiction of the United States or in the Canal Zone, without authority, wears the uniform or a distinctive part thereof or anything similar to a distinctive part of the uniform of any of the armed forces of the United States, public health service or any auxiliary of such, shall be—", and then it goes on and provides the penalty, and the penalty is something with which [397] the jury is not concerned. If there be a finding of guilty, the matter is determined in Federal Court by the judge within the limits of the penalty set.

In the event of a finding of guilty on either or both of the indictments, I instruct you that in this Court the sentence to be imposed is the sole responsibility of the Court, as I have stated. I have given you the law, read it right out of the book, which the Defendants are each charged as having violated.

I will read the indictments. First, with respect to Mr. Schacht, "On or about December 4, 1967, in the Houston division of the Southern District of Texas, Daniel J. Schacht, Defendant, willfully, knowingly and without authority, and while not an officer or an enlisted man of the United States Army, did wear a distinctive part of the official uniform of the United States Army." In violation of Title 18, United States Code, Section 702.

Now, concerning Mr. Smith—it is a short indictment in each instance—this applies to Mr. Smith.

"On or about December 4, 1967, [398] in the Houston division of the Southern District of Texas, Jarrett

Vandon Smith, Jr., Defendant, willfully, knowingly and without authority and while not an officer or an enlisted man of the United States Army, did wear a distinctive part of the official uniform of the United States Army." That is in violation of the same statute which I have just read to you.

Now, in connection with this charge, I deem it necessary to give you the definition of certain terms which I have used and will use in the course of the charge, bearing in mind you have to relate these definitions to the language I have read to you.

And, within the terms used in the indictment is the word "knowingly." It is an act that is done knowingly when it is done with knowledge. It is to be distinguished from an act which is done by mistake, inadvertence or for other innocent reasons.

Now, the acts which are referred to which are alleged in the indictment to have been done knowingly is, of course, wearing of the uniform, a significant part of the uniform.

Now, second, willfully. It says [399] in the indictment this was done by the Defendants willfully, voluntarily or purposely with the specific intent to do that which the law forbids. That is, to say that either motive or bad purpose, to disobey or disregard the law.

In this connection you are instructed that every person is presumed to intend the natural consequences of his own voluntary and deliberate acts.

Now, in this regard, there doesn't have to be a knowledge or willfulness to violate the law. The willfulness and knowledge is knowing the act.

Now, if they knowingly and willfully did that act and

the act constitutes a violation of the law, that is the knowingly and willfulness that I refer to.

The distinctive part thereof refers to the uniform. Now, distinctive—the word distinctive has a meaning, and I can delve at some length in dealing with words, but here the words would not have to resort to the distinctive nature, because a distinctive part in this case of the uniform has a special meaning because it is contained in the regulations which you will [400] recall was introduced in evidence as Government's exhibit 12.

Under the law of this country, the Congress makes the laws in accordance with the Constitution and then it can authorize—for example, the President of the United States can do and act and then the President can, in turn, make certain regulations and delegate that authority to others.

In this case, the President has delegated the uniform of the armed service. Now, the President has the authority to delegate that responsibility to others, which he has done, and he has delegated the authority with respect to prescribing the uniform for the Army to the Secretary of Defense, and it is, in turn, carried out by the officials in that department, and it results in the regulations which have been introduced in evidence, "Uniform and insignia, male personnel of the Army."

Now, we go into that. Without undertaking to read all of it to you, it says "Purpose. This regulation prescribes the authorized material, design, ornamentation, insignia, accessories, manner, and occasion for the wearing [401] of the uniform by all male personnel of the United States Army. Only uniforms and items prescribed herein or as issued will be worn." And, meaning by the Army personnel.

And, for example, it says even Army personnel cannot

wear the Army uniform while engaged in off-duty work, and so forth.

Now, in that first chapter of the regulations designated 1-7, at page 1-2, it says "Distinctive uniforms and articles thereof."

These are the regulations delegated to the President and then, in turn, delegated down.

"The following uniforms and articles thereof for male members of the United States Army are distinctive. Distinctive components of the uniforms are limited to caps, coats, jackets and trousers except as indicated."

And, it goes on to say, one, the Army green uniform, and I am only referring to these things which would seem to apply to the evidence here.

The regulations will be given to you.

Item 14, buttons, uniform, [402] U.S. Army.

Number 17, insignia, and those are designated as distinctive parts of the Army uniform. They are distinctive under these regulations.

It goes on to say—to show the importance which the preservation of the uniform in its proper condition, and that it be worn only by proper people.

They go on to say "Individuals will assure that distinctive uniform items, upon becoming unserviceable for wear by those individuals, will be mutilated, dyed, or otherwise changed so that the items no longer possess the characteristics of distinctive United States Army uniforms."

Passing on in the regulation, Chapter 2 talks about responsibilities.

Chapter 3, the wearing of the uniform, and it refers to the wearing of the uniform by separated personnel.

Now, I'm getting a little bit to the question of authority, because if one is authorized to wear the uniform, then there can be no violation of this law.

As I read it, it said the [403] violation constituted wearing a distinctive part of the uniform without authority. That is very important.

It has one section that refers to separated people, people separated out of the service. I point this out to you because Mr, Smith was in the service and has been separated.

Under certain circumstances they would be authorized to wear the uniform. It would be up to you to determine whether either of the men were authorized under the circumstances.

It says separated people may wear the uniform upon the following occasions, military funerals, memorial services and inaugurals. Patriotic parades on national holidays, or other military parades or ceremonies in which any active or reserve United States military unit is taking part. And it limits the times that a person that has been separated from the service is authorized to wear the uniform to those times.

Now, it goes on to say when the wearing of the uniform is prohibited. "In connection with non-military activity of a business or a commercial nature.

"Under any circumstances which [404] would tend to bring discredit or reproach upon the uniform." Now, Chapter 7 covers the Army green uniform. There has been a great deal of testimony about Army green, and you remember the items testified to as being olive green.

Page 7-1, it gives you the material and the coat, and the shade of Army green, and goes on to describe the cap insignia as a part of the uniform, and you recall there is testimony here concerning the cap insignia which was referred to as being turned upside down and attached to an officer's cap.

If you want to compare what is described in these regulations as a distinctive part of the uniform, you will find the emblem, the cap insignia in a picture on page 9-7, which is marked and turned down here, which is an officer's cap with the insignia there, the seal of the United States, and it is described in here as being a distinctive part of the uniform.

This is what I am telling you what it is. I am not telling you this particular emblem on this cap is a distinctive part of the uniform. That is your determination. I am telling you how you can get aid in discharging your duty.

[405] Now, on page 14-2 it speaks of caps, service, officers. And, as I recall the testimony, this was an officer's service cap, not a current issue, I believe they said, and it says "all officers. The coat of arms of the United States 2 and 3/8 inches in height of gold-plated metal," and it refers to a figure in the back as being the insignia to be worn by officers, and the emblem, which is the emblem that goes on the front of the cap when it is properly worn.

On page 14-24 there is again a picture of the emblem. You will have that before you and can consult it to the extent you desire to.

Now, in mentioning a distinctive part of the uniform, it is not necessary to constitute a violation of this statute that the entire uniform be worn, as I have explained to

you, and as the statute states. A violation occurs if a distinctive part of the uniform is worn without authority.

Now, in this specific case the Government must prove beyond a reasonable doubt each of the following things with respect to each of the Defendants, to make out the offense charged as to each Defendant. That is the following:

[406] First, that the acts charged were done knowingly and willfully, as these terms have been described to you.

Second, that each, with respect to his own case—in the indictment it says the Defendants wore a distinctive part of the official uniform of the United States, and I have undertaken to explain to you how you can make your decision factually—these pieces of uniform and insignia put in evidence—whether or not they meet that standard, whether or not they are distinctive parts of the official uniform of the Army of the United States.

Third, the Government must prove to you beyond a reasonable doubt on the cases alleged in the indictment that each of the Defendants was not an officer or an enlisted man in the United States Army, and that each had no authority to wear a uniform of the United States Army.

And, I make no authority as being for the fourth item. There are four things that you look for.

Now, as I recall the testimony, Mr. Schacht said he had never been in the Army and [407] was not an officer nor an enlisted man.

As I further recall the record, it shows that Mr. Smith had been an enlisted man in the Army, but he had been separated.

You can make up your mind by way of examining the

documents whether or not these men, either of them, on the occasion in question, was an officer or an enlisted man of the United States.

Now, from the evidence, the facts before you, elements or items one, two and three, you will probably find easily enough, the evidence can quickly come to your mind, to enable you to make your decision as to whether or not the Government has discharged its burden.

The fourth is somewhat more difficult, and that is the Government has the duty to prove that these men weren't authorized to wear the uniform of the United States Army. That brings into play a different statute or a different law. They can be authorized by the regulations, and that would be a defense, if they were a separated person wearing the uniform at the ceremonial occasions specified in the regulations, and I don't recall that the occasion here was a funeral or any kind of [408] occasion that is listed here which would authorize it, but you can examine it.

The uniform, it says, may be worn at military funerals, inaugurals, patriotic parades on national holidays or other military parades or ceremonies in which any active or reserve United States military unit is taking part.

And, as I recall the testimony here, the occasion was not that kind of an occasion, but a demonstration or a protest, and not a part of that kind of activity. To determine whether it is or not, that is for you to determine, whether Mr. Smith, as a separated man, would be authorized under that provision, the section that each of the Defendants depends upon, and it says by which he was authorized—rather, Mr. Schacht depends upon, and says he was authorized, and that is Section 772 of Title 10 of the United States Code, which provides—the law is written into two parts.

One is where it describes the unauthorized wearing of the uniform is prohibited, or a distinctive part. That is another law.

But, immediately following where it says unauthorized, it says when wearing by persons not on active duty is authorized, and [409] that would be persons not on active duty, whether they have ever served or not in the armed forces.

"When wearing by persons not on active duty authorized."

It says "A member of the Army National Guard or the Air National Guard may wear the uniform prescribed," as the case may be.

And, it says a member of the Naval Militia may do so, and retired officers and so on, and we go down and there are some ten or twelve expressly authorized circumstances.

The one that is relied upon here by Defendant Schacht says this:

"While portraying a member of the Army, Navy, Air Force or Marine Corps, an actor in a theatrical or motion picture production may wear the uniform of that armed forces if the portrayal does not tend to discredit that armed force. Remember this, the portrayal doesn't tend to discredit that armed force.

What we are talking about here is the Army, not the Navy or the Health Service, but the Army. We have the Army uniform. I will read that again because it is very important. The defense has asserted and you have got to decide it [410] fairly and from your best judgment.

The wearing of the uniform or a distinctive part is

authorized "while portraying a member of the Army, Navy, Air Force or Marine Corps, an actor in a theatrical or motion picture production may wear the uniform of that armed force if the portrayal does not tend to discredit that armed force."

Now, because of the significance of some of the words used in there, even though they are ordinary English words, I am going to refresh your memory by Webster.

The word "portrayal" there, they are talking about a portrayal of the member of the armed force. Portrayal means to make a picture or image of; delineate; depict, or play the role or represent dramatically, or act.

Theatrical is of or relating to the theater or the presentation of plays, it says here.

They say they were authorized to wear the uniform. Mr. Schacht did because he says he was portraying a member of the Army in a theatrical production.

Now, in defining the word [411] theatrical, you have to think "what does that mean?"

Theatrical, according to Webster's dictionary means of or relating to the theater or the acting or presentation of plays marked by pretense or artificiality, having the qualities of a stage play or actors' performance.

This statute says more than it is for theatrical. It says theatrical or motion picture production.

If a person is wearing the uniform in a theatrical or a motion picture production—what does production mean? A literary or artistic work, a theatrical production. The staging and performing of a theatrical entertainment; an action resembling an elaborate theatrical performance, marked by extravagant display or exhibitionism, showy spectacular.

Now, I have given you the definitions of all the words, but coming down to the one here that you heard a great deal of in the testimony and which, if the wearing of the uniform were otherwise authorized, the authorization is terminated if the person who is claiming he is wearing the uniform under authority does so and acts in a manner to discredit the armed forces of [412] which the uniform is representative.

What does discredit mean? It means to deprive of credibility, to destroy confidence or trust in, to cause disbelief, to designate as inaccurate or unreliable, to deprive of good repute, to make less reputable or to disgrace.

That is Webster's definition of discredit.

Now, the law says if anyone who would otherwise be authorized to wear the uniform or a part thereof under this limited authorization in a theatrical performance, his authority is terminated if he does so in such manner to discredit the armed forces of which that uniform is representative.

Now, if you find from the evidence introduced by the Defendants that either or both of them wore the parts of the uniform in the pursuit of a theatrical or motion picture production, as I have attempted to define to you, and the wearing of the uniform didn't tend to discredit the armed services, then it would be your duty to acquit either or both of the Defendants who were so authorized.

If you find, on the other hand, [413] and believe the Government has proved each element of the case as I have given them to you, the four, beyond a reasonable doubt as to the Defendant, you will convict that Defendant and say by your verdict guilty.

I might add you may find one Defendant guilty and

the other not guilty. You will examine the evidence to each separately in the light of the law as I have given it to you.

You may find one guilty. That is up to you. If you have a reasonable doubt as to any one of the elements I have given you with respect to the Defendant having been proved, you will acquit the Defendant and say by your verdict not guilty, by having the foreman write it.

Generally consider each Defendant and the evidence with respect to that Defendant separately in your verdict as to that Defendant.

Now, under these instructions you may find one or both of the accused guilty or not guilty. At any time during your deliberations you may turn in your verdict of guilty or not guilty with respect to a particular Defendant. [414] Now, in each indictment— just briefly—with respect to the evidence in the case as I recall it, in trying to review the evidence to you to some extent—I am telling you what my recollection is. Don't take my recollection. Take yours. Your recollection is the final and controlling one.

The indictment says the event occurred on or about December 4, 1967. Just to review with you how to go about analyzing—as I recall, there has been no question but there was an occurrence on December 4, 1967, down at the induction center on San Jacinto, when each of the Defendants was present from 6:30 in the morning to the 8:30 in the morning.

You have to determine with respect to each Defendant, whether what he did was done willfully and knowingly and without authority and while not an officer, and then you have to turn to the statute which is the defense of these people and think about it, whether or

not, first, they may have been authorized because it was a theatrical production or whether, even though it was a theatrical production, whether they were not authorized because their conduct was [415] such as to discredit the armed forces of which the uniform was a part.

Now, briefly, in the testimony you have the uniform. You can examine the uniform. You have the cap insignia. You take that with you and examine that. The photographs, you will have those, and you can look at them and that will refresh your memory as to what the record said occurred.

You have the testimony of the reporter who was offered by the Defendant, and you recall what he said about what he said occurred on the occasion.

You have the young man who was also there, his name, and who participated in the activities in which Mr. Schacht was engaged, whose name was Mr. Bernhardt, and he testified that the purpose in the activity there was to show what he thought, and Mr. Schacht said the same thing, what was going on in Vietnam, and to show the soldiers of this country were over there shooting civilians, and to do it dramatically by using red ink in a water gun. That was what was being enacted, and that was the purpose of the enactment.

The reporter stated he observed [416] the events as a part of the demonstration or protest, and reported it as such in the local press.

On the other hand, if you find that testimony and all other testimony in the case as against Mr. Schacht—he says he was there and he was putting on a play or theatrical production, theatrical performance.

The decision, ladies and gentlemen, is yours, as to the truth of the matter.

* * *

[418] counsel have the right to make objections to my charge, and I will hear them briefly before you go to the jury room.

(The following took place without the presence and hearing of the jury.)

Mr. Hartman: The Government has no objections, your Honor.

OPINION OF THE COURT OF APPEALS

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

(Caption Omitted)

Appeal from the United States District Court for the Southern District of Texas

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(May 14, 1969)

Before GOLDBERG and MORGAN, Circuit Judges, and LIEB, District Judge.

LIEB, District Judge: On December 4, 1967, approximately twenty people gathered outside the Armed Forces Induction Center at Houston, Texas. Their purpose — not unexpectedly — was to protest American participation in the Vietnam conflict. They remained on the scene from about 6:30 A.M. to about 8:30 A.M. As such events will, this one attracted the [2] news media and federal and local law enforcement agents.

Among the demonstrators[1] were Daniel Jay Schacht and Jarrett Vander Smith, Jr., the appellants in this case. Schacht was observed wearing "the fur felt Army officer's cap with the strap loose and hanging down, and with

1. As we shall see, the word "demonstrator" has become a term of legal art, but for want of an adequate substitute it will be used in its generally accepted context, unless otherwise indicated.

an Army officer's insignia upside down. On his body . . . he had an Army green shade 44 enlisted blouse with a U. S. Army Europe patch on the left shoulder." The buttons on the blouse, as well as the blouse itself, were the currently authorized buttons and blouse issued to service personnel. The eagle insignia on the cap was also of current issue. Smith was seen wearing an Army jacket or blouse with official current military buttons attached to it.

Smith and Schacht were indicted, tried by a jury and convicted of violating 18 U.S.C.A. § 702 (1964)[2], which prohibits the unauthorized wearing of a distinctive part of an Army uniform. They made no attack on the jury finding that they did wear distinctive parts of the military uniform; they raised constitutional issues concerning the free speech guaranty of the First [3] Amendment and the due process guaranty of the Fifth Amendment of the United States Constitution.

By way of defending the case in the District Court, Smith and Schacht contended that they qualified to wear part of the uniform pursuant to 10 U.S.C.A. § 772(f) (1952),[3] which permits an actor to wear a military uniform in a theatrical production "if the portrayal does not tend to discredit that armed force." It is argued on appeal

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2. 18 U.S.C.A. §702 (1964):
Whoever, in any place within the jurisdiction of the United States or in the Canal Zone, without authority, wears the uniform or a distinctive part thereof or anything similar to the distinctive part of the uniform of any of the armed forces of the United States, Public Health Service or any auxiliary of such, shall be fined not more than $250 or imprisoned not more than six months, or both.

3. 10 U.S.C.A. §772(f) (1952):
While portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force if the portrayal does not tend to discredit that armed force.

that the appellants were participating in a play or skit which was designed to expose the evil of the American presence in Vietnam. They maintain that their actions were protected by 10 U.S.C.A. § 772(f) (1952) or, if not, that the statute creating an exception to the principal violation acts as an unconstitutional restraint on the right of free speech and is unconstitutionally vague.

The evidence indicates that the demonstration in Houston was part of a nationally coordinated movement which was to take place contemporaneously at several places throughout the country. The appellants and their colleagues prepared a script to be followed at the induction center and they actually rehearsed their roles at least once prior to the appointed day before a student organization called the Humanists."[4]

[4] Initially it should be stated that the evidence does not situate Smith as a participant in the so-called "skit." Apparently his only function was to distribut leaflets to the onlookers. That portion of this opinion which considers the Section 772(f) defense, therefore, is limited to appellant Schacht; as to Smith the defense is inapposite.

The skit was composed of three people. There was Schacht who was dressed in a uniform and cap. A second person was wearing "military colored" coveralls. The third person was outfitted in typical Viet Cong apparel.[5] The first two men carried water pistols. One of them would yell, "Be an able American," and then they would shoot the Viet Cong with their pistols. The pistols expelled a red liquid which, when it struck the victim, created the

4. The record does not indicate whether this skit was enacted elsewhere by opponents of the Vietnam War at the other locations in the country where demonstrations were conducted on that day.

5. The identity of the person who wore the military overalls was not determined by the authorities. Another university student was dressed as the Viet Cong.

impression that he was bleeding. Once the victim fell down the other two would walk up to him and exclaim, "My God, this is a pregnant woman." Without noticeable variation this skit was reenacted several times during the morning of the demonstration. A demonstrator testified at trial that the purpose of their activities was not "to discredit the Army exactly, to discredit the actions of the United States being involved." Undoubtedly that statement fairly depicts the objectives of Smith and Schacht.

Smith and Schacht were not convicted for disturbing the peace or for disorderly conduct. They were not charged with sedition, treason, mutiny, or the like; nor [5] were they prosecuted for the substance of their utterances, either oral or written. Smith and Schacht were not prosecuted because of their roles in the performance of a skit which was critical of the American involvement in Vietnam.

Smith and Schacht were prosecuted for their unauthorized wearing of a distinctive part of the military uniform, plain and simple. Without more, their convictions would be unassailable from a constitutional viewpoint. They wore portions of the current issue of the military uniform; they did not have lawful permission to wear the uniform; and they acted with knowledge of what they were doing. For their violation of the statute they were tried and convicted by a jury.

The appellants, however, seek to cloak their action with the First Amendment guaranty against intrusions on their right of free and unhampered speech. How has the United States violated their right to free speech? Smith and Schacht argue that by regulating the wearing of armed forces uniforms, the United States has on this occasion restricted their constitutional right to peaceably demonstrate and speak on topics which are unpleasant

to the majority of citizens; that the statutory regulation acts as a previous restraint on their peaceful activities.

I.

The statute with which we are concerned, 18 U.S.C.A. § 702 (1964), proscribes certain *conduct*. It makes unlawful the wearing of a distinctive part of a military [6] uniform without permission.

It is assumed, and we think properly, that the appellants had a perfect right to demonstrate when and where they did. The demonstration was peaceable and orderly; it was not illegal as such. Accord, *Brown v. Louisiana,* 383, U.S. 131 (1966). The appellants sought to highlight alleged governmental evils and they were free to do so as an incident to their rights as citizens. In *Rosenblatt v. Baer,* 383 U.S. 75, 85 (1966), the Court declared that:

> Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized.

See also, *Mills v. Alabama,* 384 U.S. 214, 218 (1966); *Cantwell v. Connecticut,* 310 U.S. 296, 310 (1940).

Constitutional principles caution us to be circumspect when deciding controversies that include problems affecting freedom of speech. In weighing the possible evils to be derived at the hands of a strong federal government, our forefathers decided that the infringement of a man's speech was primary.[6] And so, it has long been the policy of the courts to observe the rule enunciated recently in *Ashton v. Kentucky,* 384 U.S. 195, 200 (1966):

.6. Richards, *The Historical Rationale of the Speech-and-Press Clause of the First Amendment,* 21 U. Fla. L. Rev. 203 (1968).

[7] When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer.[2] [Footnote Omitted]

What we have said, however, should not be understood to mean that we are powerless to act when First Amendment defenses are hoisted. Constitutional rights are not the special possession of man isolated from society; the rights extend to all men, and their welfare also must be considered. Freedom of speech is not illimitable.

First Amendment rights "are not confined to verbal expression"; they include appropriate types of action. *Brown v. Louisiana, supra,* at 141-142; *Garner v. Louisiana,* 368 U.S. 157 (1961). At the same time, "certain forms of conduct mixed with speech may be regulated or prohibited." *Cox v. Louisiana,* 379 U.S. 536, 563 (1965). It becomes essental, therefore, for this Court to strike a constitutionally acceptable balance so that any statutory inhibition on the exercise of free speech will not fall within that vast wasteland of proscribed governmental activity.

The problem before us is not a novel one. The Supreme Court of the United States has contended with it on several occasions and, yet it remains unresolved. We start with what the Court said in *Cox v. Louisiana, supra,* at 555:

[8] We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.

Smith and Schacht were participating in two modes of conduct at the same time that they were voicing their disapproval of their sovereign's involvement in Vietnam. First, Smith was distributing leaflets and Schacht was acting out his role as a soldier in the skit. As to these activities the Government has no quarrel. Second, both men were wearing distinctive parts of the current issue of the military uniform. This conduct was forbidden by Congress and their doing of it resulted in their prosecution for violation of a criminal statute.

Can the United States Government lawfully enforce a criminal statute which may have as an incidental effect the inhibition of an individual's right of free expression? We think that it can under proper circumstances.

The most instructive case available is *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949). The State of Missouri had a statute which made it a felony for any person to enter into an agreement in restraint of trade or competition. Giboney and other members and officers of a local union attempted to induce Empire [9] to refrain from selling its ice to certain retail ice peddlers who refused to join the local union. When Empire refused to join the boycott of the peddlers, the union commenced peaceful picketing of Empire's premises. In upholding the trial court, which had issued an injunction against the union to cease its picketing, the State Supreme Court found that the union was striving to compel Empire to enter with it into an agreement which would amount to a violation of a state criminal statute.

The labor union argued in the United States Supreme Court that it had a constitutional right under the First Amendment to picket Empire's premises in conjunction with the labor dispute. The Court, Mr. Justice Black writing, replied:

> Aside from the element of disseminating information through peaceful picketers, . . . it is difficult to perceive how it could be thought that these constitutional guaranties afford labor union members a peculiar immunity from laws against trade restraint combinations, unless, as appellants contend, labor unions are given special constitutional protection denied all other people.[2]
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> * * * *
>
> *It rarely has been suggested that the constitutional freedom of speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of* [10] *a valid criminal statute. We reject the contention now.* Nothing that was said or decided in any of the cases relied on by appellants calls for a different holding.
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> * * * *
>
> . . . it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. [Emphasis Added; Footnote Omitted]

336 U.S. 496-502. The Court unanimously upheld the injunction against the union.

Most recently the Supreme Court has had occasion to address itself to a controversy which appears strikingly similar to our own. In *Tinker v. Des Moines Independent Community School District, No. 21* (U.S., February 24, 1969), the petitioners were suspended from school for knowingly violating a regulation which forbade wearing an armband at school as a form of protesting American involvement in Vietnam. The petitioners filed their complaint in the District Court seeking an injunction and nominal damages against the school officials. The lower court dismissed the complaint and the Court of Appeals

for the Eighth Circuit affirmed by an equally divided court.

[11] The Supreme Court reversed the dismissal of the complaint for the reason that the officials' action constituted a violation of petitioners' freedom of speech.

> . . . The wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. . . . It was closely akin to "pure speech" which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment. (Slip Opinion, pp. 2-3)

A serious examination of *Tinker,* however, reveals that it does not dictate the outcome of the instant case. The touchstone in both cases is the nature of the restriction that was thwarted by the demonstrators. In *Tinker* the petitioners ignored a hastily-conceived regulation which had been promulgated by the school principals shortly before and in anticipation of the demonstration.

> Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities. (Slip Opinion, p. 5)

The distinction should now be evident. We are asked to consider the exercise of First Amendment rights against the background of a federal criminal statute.

We do not think that the statute prohibiting unlawful wearing of a military uniform must fall when it affects [12] incidentally the exercise of free speech. We agree with the Court in *Giboney* when it stated that the Constitution does not extend "its immunity to speech or writing used as an integral part of conduct in violation

of valid criminal statute."[7]

We cannot say that the unauthorized wearing of a military uniform is on the same plane as the wearing of an armband. It does not constitute a "symbolic act" akin to "pure speech." The statute we are reviewing was narrowly drawn to prohibit certain conduct that infringes a substantial national interest in maintaining the dignity of the armed forces. Accord, *Cox v. Louisiana, supra,* at 564; contra, *Edwards v. South Carolina,* 372 U.S. 229, 236 (1963). Nor can it wisely be argued that the statute is vague. It forbids one type of conduct. Its language is plain and notice of its proscription is evident. *Adderley v. Florida,* 385 U.S. 39, 42 (1966).

As the Supreme Court stated thirty years ago, in *Schneider v. State,* 308 U.S. 147, 161 (1939):

> [13] Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.

See also, *Cameron v. Johnson,* 390 U.S. 611, 617 (1968).

II.

Smith and Schacht next argue that 10 U.S.C.A.

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7. Not even Smith and Schacht question the validity of the statute, except as it has been applied to them. We have been unable to find any cases which discuss the validity and legislative purpose of the statute, but there do exist cases which examine related statutes. With respect to Section 32 of the Criminal Code of March 6, 1909 (false impersonation of an officer of the United States), the Court in *United States v. Barnow,* 239 U.S. 74, 80 (1915), said, "It is the aim of the section . . . to maintain the general good repute and dignity of the service itself." See also, *United States v. Lepowitch,* 318 U.S. 702 (1943); *United States v. Wight,* 176 F.2d 376 (2d Cir. 1949).

§772(f) (1952),[8] an exception to the criminal statute discussed above, is unconstitutionally vague. They quarrel with the section which permits an actor in a "theatrical or motion picture production" to wear a military uniform unless his actions "tend to discredit that armed force." We do not consider such objection well-founded. The language of legislative grace is amply clear. Coupled with appropriate common-sense instructions by the judge, a jury would certainly be capable of reaching a rational decision concerning the appellants' activities.

III.

Following Appellant Smith's conviction and judgment of guilt the trial judge placed him on three years' probation with certain special conditions attached. In exchange for the privilege of probation Smith was required to "forego any association whatever with the Students for Democratic Society Organization," and to "Discontinue your association with [14] the members of the Humanists group with which you violated the law." Smith argues that these strictures violate his First Amendment rights of expression and assembly.

18 U.S.C.A. § 3651 (1964) authorizes the trial court to place a criminal defendant on probation "for such period and upon such terms and conditions as the court deems best." Congress obviously intended by means of the broad statutory language to invest the court with great discretion to establish conditions which would lead to the defendant's ultimate acceptance by society. *Barnhill v. United States*, 279 F.2d 105 (5th Cir. 1960), cert. denied, 364 U.S. 824 (1960). Smith could have rejected probation and elected prison. He chose to enjoy

8. See footnote #3.

the benefits of probation; he must also endure its restrictions. The trial court did not abuse its discretion in attaching the special conditions to Smith's probation.

AFFIRMED.

GOLDBERG, Circuit Judge, concurring specially:

Though concurring in the result my brothers have reached, I am impelled to uphold this conviction through a slightly different constitutional approach. I am less impressed by the distinction between speech and conduct than I am by the fact that the statute before us has a legitimate nonspeech objective.

I begin by noting that the statute under which the present conviction was obtained operates to preserve [15] the integrity of the military uniform by restricting its use to authorized persons. Whatever the object of such a restriction, whether to protect against the possibility of military impersonation, or simply to safeguard the need for a sure and expedient means of military identification, the restriction nonetheless has only the most remote and incidental effect upon free speech.

In order better to illustrate the remoteness of this impact on First Amendment rights, the present case is usefully compared to *O'Brien v. United States,* 1968, 391 U.S. 367, ____S.Ct.____; 20 L.Ed.2d 672. In *O'Brien* the Supreme Court held that a prohibition against the knowing mutilation or destruction of a draft card was not unconstitutional as applied to one who had burned the draft card in protest against the war in Vietnam. The Court based its decision in large measure on the fact that the government had a substantial nonspeech re-

lated interest in seeing that draft cards were not destroyed.[1]

The government interest in seeing that uniforms are

1. "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest." 20 L.Ed.2d at 679-680.

* * *

". . . the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct. The governmental interest and the scope of the 1965 Amendment are limited to preventing a harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted.

"The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. In Stromberg v. California, 283 U.S. 359, 75 L.Ed. 1117, 51 S.Ct. 532, 73 A.L.R. 1484 (1931), for example, this Court struck down a statutory phrase which punished people who expressed their 'opposition to organized government' by displaying 'any flag, badge, banner, or device.' Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct. See also, NLRB v. Fruit & Vegetable Packers Union, 377 U.S. 58, 79 (concurring opinion) 12 L.Ed.2d 129, 142, 84 S.Ct. 1063 (1964).

"In conclusion, we find that because of the Government's substantial interest in assuring the continuing availability of issued Selective Service certificates, because amended §462(b) is an appropriately narrow means of protecting this interest and condemns only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of O'Brien's act of burning his registration certificate frustrated the Government's interest, a sufficient governmental interest has been shown to justify O'Brien's conviction." 20 L.Ed.2d at 683.

not worn by unauthorized persons is also nonspeech oriented. It is no more affected by the use of the uniform as a vehicle of protest than was the governmental interest in draft cards. In fact, it is reasonable to say that the statute before us has an even less inhibiting effect on free speech than the statute in [17] *O'Brien.* At least the statute before us enjoins only the *wearing* of a military uniform, not its destruction. As such its violation is complete when the uniform is donned. The subsequent use of the uniform for protest purposes is entirely irrelevant to the statute's real objectives. These objectives require that the patriot no less than the revolutionary, the bystander no less than the protester, forego the unauthorized wearing of the uniform. First Amendment rights do not suffer by the enforcement of such a statute.

Nothing in *Tinker v. Des Moines Independent Community School District,* 1969, 37 U.S.L.W. 4121, affects the constitutionality of the statute before us. In *Tinker* a school regulation banning the wearing of armbands to school was declared unconstitutional as an unreasonable restriction on free speech. While it seems plausible to say that the armband was no more or less a symbol of protest to its wearers than was the uniform in the case before us, the armbands, unlike the uniform and the draft cards, were not appendant to any valid governmental interest.

There was, to be sure, a valid governmental interest in *Tinker* that required the preservation of order and discipline within the school, and this the Court acknowledged. But this interest was no more derivative from or inherent in armbands than in purely verbal criticism of the Vietnam war. In short, armbands are "akin to pure speech," 37 U.S.L.W. at 4122, because they generate no governmental interest apart from the message they communicate.

[18] Uniforms and draft cards, on the other hand, are essential to purposes and perform secondary functions which have nothing to do with free speech. Since regulation of their use is not designed to also regulate attitudes toward them, *cf. Stromberg v. California,* 1931, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117, their enforcement will not imperil First Amendment freedoms. I am convinced that the statute before us was not conceived in the suppression of freedom of expression. I must therefore conclude that its nullification cannot be justified because its violation was birthed in protest.

I would also affirm the judgment of the district court.

JUDGMENT OF THE COURT OF APPEALS

(Caption Omitted)

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

May 14, 1969

GOLDBERG, Circuit Judge, specially concurs.
Issued as Mandate;

ORDER GRANTING CERTIORARI

Daniel Jay SCHACHT, petitioner, v.

UNITED STATES, No. 628.

Facts and opinion, United States v. Smith, 414 F.2d 630.

Dec. 15, 1969. Motion for leave to file petition for writ of certiorari out of time granted. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted and case placed on the summary calendar.

THE CHIEF JUSTICE, Mr. Justice STEWART and Mr. Justice WHITE would deny motion for leave to file petition out of time.

IN THE

Supreme Court of the United States

October Term, 1969

No. 628

DANIEL JAY SCHACHT, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1969

No._____

DANIEL JAY SCHACHT, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Petitioner, DANIEL JAY SCHACHT, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on May 14, 1969.

OPINION BELOW

The Opinion of the Circuit Court of Appeals, printed in Appendix C hereto, *infra*, page 15, is as yet unreported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 14, 1969 (R. 454). No Motion for Rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 22(2), Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

(1) Whether Title 10, U.S.C.A., §772(f), is unconstitutional under the First Amendment as (a) an overly-broad prohibition upon Constitutionally-protected speech, both symbolic and oral; (b) a previous and chilling restraint on the right of free speech; and/or (c) an attempt by Congress to censor where there is no clear and present danger;

(2) Whether or not Title 10, U.S.C.A., §772(f) is so vague, indefinite, and overly-broad as to be repugnant to the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

(3) Whether or not Title 18, U.S.C.A., §702, can be Constitutional, absent a properly-drawn exception carving out Constitutionally-protected activity;

(4) Whether or not Title 18, U.S.C.A., §702, and Title 10, U.S.C.A., §772(f), have been applied unconstitutionally to Petitioner, abridging his right of free speech under the First Amendment to the Constitution and depriving him of due process of law under the Fifth Amendment to the Constitution.

STATUTES INVOLVED

The statutory provisions involved are Title 18, U.S.C.A., Crimes and Criminal Procedure, §702, and Title 10, U.S.C.A., Armed Forces, §772(f).

STATEMENT

Petitioner was tried and convicted in the District Court for the unauthorized wearing of a distinctive part of an Armed Forces uniform.[1]

In the District Court Petitioner attacked the Constitutionality of both Title 18, U.S.C.A., §702, and Title 10, U.S.C.A., §772(f) and the Constitutionality of their application to him, by his Motion to Quash indictment (R. 11-17).

The evidence, which is not in dispute, showed that the Petitioner took part in a nationally-coordinated protest against the Vietnamese war in front of the Armed Forces Induction Center in downtown Houston, Texas, from about 6:30 a.m. to 8:30 a.m. on December 4, 1967 (R. 101).

Petitioner wore a "fur felt Army officer's cap on his head with the strap loose and hanging down, and with an Army officer's insignia upside down. On his body * * * he had an Army green shade 44 enlisted blouse with a U. S. Army Europe patch on the left shoulder." (R. 173). The buttons on the blouse were "current authorized buttons." (R. 177). The buttons on the blouse, as well as the blouse itself, were the currently authorized buttons and blouse issued to Service personnel. The eagle

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1. A co-defendant, Jarret Vander Smith, also convicted, does not join in this Petition for Writ of Certiorari.

insignia on the cap was also current issue (R. 437). According to his own testimony, Petitioner was wearing "a pair of civilian boots, green civilian pants, a belt with silver buckle, regular shirt, dress green, rank insignia U. S. Army removed, no lapels, and the obsolete hat, World War II hat. The insignia was upside down, one strap was dangling." (R. 319).

Petitioner and others had practiced a skit concerning the Vietnamese war which they then presented before the Induction Center (R. 275, 276).

A newspaper reporter, present at the time, testified:

> "One would say, 'Be an able American,' and they would shoot the Viet Cong, and he would fall to the pavement, and they would walk up to the third person and kick the cape aside and say, 'My God, this is a pregnant woman.'" (R. 265)

Petitioner's point in taking part in the skit was to display his and the group's disapproval of the involvement of the United States Army in Vietnam (R. 334).

Subsequent to the above-described conduct, Petitioner was arrested and charged with violation of Title 18, U.S.C.A., §702. Petitioner was convicted on February 15, 1968, and sentenced to six (6) months to be served on March 4, 1968.

On appeal to the United States Court of Appeals for the Fifth Circuit, the Petitioner raised the same questions concerning the Constitutionality of the statutes and of their application to him as were raised by the Motion to Quash the Indictment in the District Court. The Fifth Circuit Panel affirmed the conviction and sentence of Petitioner, resting its Opinion on Appellant's violation

of Title 18, U.S.C.A., §702, and dismissing any argument that the Act(s) are unconstitutional or unconstitutionally applied (R. 447, 448).

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed by the Court for the following reasons:

I.

Petitioner's defense in the District Court was based on Title 10, U.S.C.A., §772(f), an exception to Title 18, U.S.C.A., §702, which authorizes the wearing of distinctive parts of the Armed Forces uniform in a play so long as the portrayal does not "tend to discredit" that Armed Force. Assuming *arguendo* that Petitioner's words in the play did "tend to discredit" the United States Army, it must be urged that criticism or derision of the Armed Forces, or any institution of government, is clearly protected speech under the First Amendment. See *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641 (1942); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Garner v. Louisiana*, 368 U.S. 157 (1961); *Taylor v. Louisiana*, 370 U.S. 154 (1962); *Brown v. Louisiana*, 383 U.S. 131 (1966). *A fortiori*, the protection offered a civilian-dressed Petitioner speaking critically or derisively of the Army, cannot be dissolved by his speaking the same words dressed in an Army uniform during a play. The exception is unconstitutional as an impingement on First Amendment right of free speech. *Stromberg v. California*, 283 U.S. 259 (1931).

Congress has implicitly recognized the above principle that Title 18, U.S.C.A., §702, imperils freedom of speech

and expression, at least in the drama, by engrafting the narrow Title 10, U.S.C.A., §772(f) exception to the statute; As Congress undoubtedly was aware, had no exception been drawn to Title 18, U.S.C.A., §702, that statute would have been patently unconstitutional, in that its proscription reaches protected areas of oral and symbolic speech. *Cox v. Louisiana,* 379 U.S. 453 at f.n. 14 (1965). See also *Tinker v. DesMoines Independent Community School District No. 21* (U.S. February 24, 1969). The question which now confronts the Court is whether the attempt by Congress to render Title 18, U.S.C.A., §702, Constitutional was successful. That is, does Title 10, U.S.C.A., §772(f), carve out from Title 18, U.S.C.A., §702, all areas which are Constitutionally-protected from encroachment?

Petitioner submits that the exception is defective for the following reasons:

(A) Congress has emasculated its apparent grant of freedom of speech in the Title 10 exception by saddling the exception itself with a vague exception. *"While portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force if the portrayal does not tend to discredit that armed force." Title 10, U.S.C.A., §772(f).*

This wording is repugnant to the Due Process Clause of the Fifth Amendment for its failure to enunciate explicitly what acts and words will be prohibited, in that such acts and words, according to the exception, "tend to discredit" the Armed Force portrayed. The result of this imprecise language is that freedom of expression under the First Amendment is severely limited and chilled.

Such a law is considered void for indefiniteness. *Winters v. N. Y.*, 333 U.S. 507 (1948); *Dombrowski v. Pfister*, 380 U.S. 479 (1964).

(B) Absent any statutory exception, it is clear that any legislation, including Title 10, U.S.C.A., §772(f) the legislation here under attack, would have to have been based upon a clear and present danger prior to its being Constitutionally privileged to inhibit what would otherwise be First Amendment rights. *Schenck v. U. S.*, 249 U.S. 47 (1919). It is urged that no clear and present danger could possibly exist to restrict the use of acts and words in a play when spoken and performed by an actor in uniform. If, then, the exception is rendered void by the rule of *Schenck, supra,* it is clear that Title 18, U.S.C.A., §702, must be unconstitutional in that it prohibits, without an exception, the wearing of uniforms in plays. As recognized by Congress in its abortive attempt to draft a saving exception to Title 18, U.S.C.A., §702, the appearance of actors in Armed Forces uniforms in plays represents an area where there is no clear and present danger. *West Virginia State Board of Education v. Barnette, supra,* and *Cox v. Louisiana*, 379 U.S. 453.

Is an Act prohibiting a performer, costumed in an Armed Forces uniform, from engaging in portrayals which "tend to discredit" that Armed Force, any cruder a form of censorship than the Sedition Act of 1798 which prohibited ". . . [F]alse, scandalous, and malicious writings against the Government of the United States . . ."? This Act represented an attempt by the Federalists to control political opinion; the Act died, happily, by its own terms in 1801, and it became ". . . something close to a constitutional tradition, that such legislation, if it were ever

enacted again, would be unconstitutional." Freund and Sutherland, *II Constitutional Law,* 1377, Little, Brown and Company (1961).

Whatever Petitioner's intentions, he was forced to subject himself to criminal prosecution to determine whether or not his part in the play in fact tended to discredit the United States Army; this is perilous for an actor and the First Amendment was drafted to protect individuals from this very form of prior restraint. *Near v. Minnesota,* 283 U.S. 697, 721 (1931); see also *Dombrowski, supra.* If this exception were Constitutional, Congress could also provide for an actor to be brought before a court or even an administrative officer at any time and be required to submit his part, *his words,* for a determination of their statutory significance. *Near v. Minnesota, supra,* at 721, and *Dombrowski v. Pfister, supra,* at 486.

If Petitioner is correct in his contention that the Title 10 exception to Title 18 is unconstitutionally vague and overboard, then it is clear that Title 18 itself must necessarily fall by virtue of the impermissible impingement upon the Constitutionally-protected area.

II.

It is well settled that a law Constitutional on its face may nevertheless be applied unconstitutionally. Thus, in *Brown v. Louisiana, supra,* where a breach of the peace statute was invoked against those involved in a peaceful demonstration against segregation, the Court *held* the statute was unconstitutionally applied. In the case at bar, involving essentially similar circumstances, a statute has been invoked against one peacefully demonstrating his

opposition to the war in Vietnam, and by such arbitrary application, the law involved becomes a deadly governmental weapon ". . . deliberately and purposefully applied solely to terminate the reasonable, orderly, and limited exercise of the right to protest . . ." *Brown v. Louisiana, supra,* at 724.[2]

The fact that the *Brown* Case involved a State statute and the instant statute was promulgated by Congress is of no legal significance. As held by this Court in *Bolling v. Sharpe,* 347 U.S. 497 (1947), the Federal Government is held to at least as great a standard as the state governments in the application of its laws to its citizens.

There are only four cases reported under this statute, none of which are related in substance to the issues in Petitioner's case and none more recent than 1949. In light of this evidence of disuse and the equally impressive fact that the Government permits sale of Armed Forces uniforms to the general public (R. 243) and fails to prosecute the multitude of citizens wearing distinctive parts of the Armed Forces uniforms, such as hunters in their Navy pea jackets, teenagers in their Army raincoats, and uniformed actors in plays which undeniably discredit the Armed Forces (R. 13), such as *Madama Butterfly* and *Dr. Strangelove,* the conclusion demanded is that the prosecution of this Petitioner for the wearing of a distinctive part of the United States Army uniform in an anti-Vietnam skit was arbitrary and therefore deprives Petitioner of due process of law and of his fundamental right of free speech under the respective holdings of *Bolling v. Sharpe supra* and *Brown v. Louisiana, supra.*

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2. A careful examination of the record reveals that no contention was made at the trial that the demonstration was anything but orderly and peaceful.

III.

The United States Court of Appeals for the Fifth Circuit has clearly erred in its decision. The three-judge panel has chosen to ignore the First Amendment freedom of speech argument and rested its Opinion solely on Appellant's violation of Title 18, §702, summarily dismissing any argument that the act(s) are unconstitutional or unconstitutionally applied (R. 447, 448).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted and the decision of the United States Court of Appeals for the Fifth Circuit be reversed.

Respectfully submitted,

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CERTIFICATE OF DELIVERY

I, DAVID H. BERG, Attorney, and ARTHUR MANDELL, Attorney of Record for Petitioner, DANIEL JAY SCHACHT, and a member of the Bar of the Supreme Court of the United States, depose and say that on the 22d day of September, 1969, triplicate copies of the foregoing Petition for Writ of Certiorari in the Supreme Court of the United States were served in person on Honorable Erwin Griswold, Solicitor General of the United States, Attorney of Record for the Respondent.

Arthur J. Mandell

SUBSCRIBED and SWORN TO before the undersigned authority this the 22d day of September, 1969.

Elizabeth Scott

Notary Public in and for Harris County, Texas

APPENDIX A

Title 18 U.S.C.A. Sec. 702

Uniform of armed forces and PUBLIC HEALTH SERVICE—Whoever in any place within the jurisdiction of the United States or the Canal Zone, without authority, wears the uniform or a distinctive part thereof or anything similar to a distinctive part of the uniform of any of the armed forces of the United States, Public Health Service, or any auxiliary of such, shall be fined not more than $250 or imprisoned not more than six months, or both. June 25, 1948 c. 645 62 Stat. 732; May 24, 1949, c. 139, Sec. 15(a), 63 Stat. 91.

Title 10 U.S.C.A. Sec. 772(f)

While portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force if the portrayal does not tend to discredit that armed force. Title 10, U.S.C.A., §772(f)

APPENDIX B

FIRST AMENDMENT

Congress shall make no law restricting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment for indictment of a Grand Jury, except in cases arising in land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

(Caption Omitted)

Appeal from the United States District Court for the Southern District of Texas

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(May 14, 1969)

Before GOLDBERG and MORGAN, Circuit Judges, and LIEB, District Judge.

LIEB, District Judge: On December 4, 1967, approximately twenty people gathered outside the Armed Forces Induction Center at Houston, Texas. Their purpose — not unexpectedly — was to protest American participation in the Vietnam conflict. They remained on the scene from about 6:30 A.M. to about 8:30 A.M. As such events will, this one attracted the [2] news media and federal and local law enforcement agents.

Among the demonstrators[1] were Daniel Jay Schacht and Jarrett Vander Smith, Jr., the appellants in this case. Schacht was observed wearing "the fur felt Army officer's cap with the strap loose and hanging down, and with

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1. As we shall see, the word "demonstrator" has become a term of legal art, but for want of an adequate substitute it will be used in its generally accepted context, unless otherwise indicated.

an Army officer's insignia upside down. On his body . . . he had an Army green shade 44 enlisted blouse with a U. S. Army Europe patch on the left shoulder." The buttons on the blouse, as well as the blouse itself, were the currently authorized buttons and blouse issued to service personnel. The eagle insignia on the cap was also of current issue. Smith was seen wearing an Army jacket or blouse with official current military buttons attached to it.

Smith and Schacht were indicted, tried by a jury and convicted of violating 18 U.S.C.A. § 702 (1964)[2], which prohibits the unauthorized wearing of a distinctive part of an Army uniform. They made no attack on the jury finding that they did wear distinctive parts of the military uniform; they raised constitutional issues concerning the free speech guaranty of the First [3] Amendment and the due process guaranty of the Fifth Amendment of the United States Constitution.

By way of defending the case in the District Court, Smith and Schacht contended that they qualified to wear parts of the uniform pursuant to 10 U.S.C.A. § 772(f) (1952),[3] which permits an actor to wear a military uni-

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2. 18 U.S.C.A. §702 (1964):

> Whoever, in any place within the jurisdiction of the United States or in the Canal Zone, without authority, wears the uniform or a distinctive part thereof or anything similar to the distinctive part of the uniform of any of the armed forces of the United States, Public Health Service or any auxiliary of such, shall be fined not more than $250 or imprisoned not more than six months, or both.

3. 10 U.S.C.A. §772(f) (1952):

> While portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force if the portrayal does not tend to discredit that armed force.

form in a theatrical production "if the portrayal does not tend to discredit that armed force." It is argued on appeal that the appellants were participating in a play or skit which was designed to expose the evil of the American presence in Vietnam. They maintain that their actions were protected by 10 U.S.C.A. § 772(f) (1952) or, if not, that the statute creating an exception to the principal violation acts as an unconstitutional restraint on the right of free speech and is unconstitutionally vague.

The evidence indicates that the demonstration in Houston was part of a nationally coordinated movement which was to take place contemporaneously at several places throughout the country. The appellants and their colleagues prepared a script to be followed at the induction center and they actually rehearsed their roles at least once prior to the appointed day before a student organization called the Humanists."[4]

[4] Initially it should be stated that the evidence does not situate Smith as a participant in the so-called "skit." Apparently his only function was to distribute leaflets to the onlookers. That portion of this opinion which considers the Section 772(f) defense, therefore, is limited to appellant Schacht; as to Smith the defense is inapposite.

The skit was composed of three people. There was Schacht who was dressed in a uniform and cap. A second person was wearing "military colored" coveralls. The third person was outfitted in typical Viet Cong apparel.[5]

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4. The record does not indicate whether this skit was enacted elsewhere by opponents of the Vietnam War at the other locations in the country where demonstrations were conducted on that day.

5. The identity of the person who wore the military overalls was not determined by the authorities. Another university student was dressed as the Viet Cong.

The first two men carried water pistols. One of them would yell, "Be an able American," and then they would shoot the Viet Cong with their pistols. The pistols expelled a red liquid which, when it struck the victim, created the impression that he was bleeding. Once the victim fell down the other two would walk up to him and exclaim, "My God, this is a pregnant woman." Without noticeable variation this skit was reenacted several times during the morning of the demonstration. A demonstrator testified at trial that the purpose of their activities was not "to discredit the Army exactly, to discredit the actions of the United States being involved." Undoubtedly that statement fairly depicts the objectives of Smith and Schacht.

Smith and Schacht were not convicted for disturbing the peace or for disorderly conduct. They were not charged with sedition, treason, mutiny, or the like; nor [5] were they prosecuted for the substance of their utterances, either oral or written. Smith and Schacht were not prosecuted because of their roles in the performance of a skit which was critical of the American involvement in Vietnam.

Smith and Schacht were prosecuted for their unauthorized wearing of a distinctive part of the military uniform, plain and simple. Without more, their convictions would be unassailable from a constitutional viewpoint. They wore portions of the current issue of the military uniform; they did not have lawful permission to wear the uniform; and they acted with knowledge of what they were doing. For their violation of the statute they were tried and convicted by a jury.

The appellants, however, seek to cloak their action with the First Amendment guaranty against intrusions

on their right of free and unhampered speech. How has the United States violated their right to free speech? Smith and Schacht argue that by regulating the wearing of armed forces uniforms, the United States has on this occasion restricted their constitutional right to peaceably demonstrate and speak on topics which are unpleasant to the majority of citizens; that the statutory regulation acts as a previous restraint on their peaceful activities.

I.

The statute with which we are concerned, 18 U.S.C.A. § 702 (1964), proscribes certain *conduct*. It makes unlawful the wearing of a distinctive part of a military [6] uniform without permission.

It is assumed, and we think properly, that the appellants had a perfect right to demonstrate when and where they did. The demonstration was peaceable and orderly; it was not illegal as such. Accord, *Brown v. Louisiana,* 383 U.S. 131 (1966). The appellants sought to highlight alleged governmental evils and they were free to do so as an incident to their rights as citizens. In *Rosenblatt v. Baer,* 383 U.S. 75, 85 (1966), the Court declared that:

> Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free; lest criticism of government itself be penalized.

See also, *Mills v. Alabama,* 384 U.S. 214, 218 (1966); *Cantwell v. Connecticut,* 310 U.S. 296, 310 (1940).

Constitutional principles caution us to be circumspect when deciding controversies that include problems affect-

ing freedom of speech. In weighing the possible evils to be derived at the hands of a strong federal government, our forefathers decided that the infringement of a man's speech was primary.[6] And so, it has long been the policy of the courts to observe the rule enunciated recently in *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966):

> [7] When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer.[2] [Footnote Omitted]

What we have said, however, should not be understood to mean that we are powerless to act when First Amendment defenses are hoisted. Constitutional rights are not the special possession of man isolated from society; the rights extend to all men, and their welfare also must be considered. Freedom of speech is not illimitable.

First Amendment rights "are not confined to verbal expression"; they include appropriate types of action. *Brown v. Louisiana, supra,* at 141-142; *Garner v. Louisiana,* 368 U.S. 157 (1961). At the same time, "certain forms of conduct mixed with speech may be regulated or prohibited." *Cox v. Louisiana,* 379 U.S. 536, 563 (1965). It becomes essential, therefore, for this Court to strike a constitutionally acceptable balance so that any statutory inhibition on the exercise of free speech will not fall within that vast wasteland of proscribed governmental activity.

The problem before us is not a novel one. The Supreme Court of the United States has contended with it on sev-

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6. Richards, *The Historical Rationale of the Speech-and-Press Clause of the First Amendment,* 21 U. Fla. L. Rev. 203 (1968).

eral occasions and, yet it remains unresolved. We start with what the Court said in *Cox v. Louisiana, supra,* at 555:

> [8] We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.

Smith and Schacht were participating in two modes of conduct at the same time that they were voicing their disapproval of their sovereign's involvement in Vietnam. First, Smith was distributing leaflets and Schacht was acting out his role as a soldier in the skit. As to these activities the Government has no quarrel. Second, both men were wearing distinctive parts of the current issue of the military uniform. This conduct was forbidden by Congress and their doing of it resulted in their prosecution for violation of a criminal statute.

Can the United States Government lawfully enforce a criminal statute which may have as an incidental effect the inhibition of an individual's right of free expression? We think that it can under proper circumstances.

The most instructive case available is *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490 (1949). The State of Missouri had a statute which made it a felony for any person to enter into an agreement in restraint of trade or competition. Giboney and other members and officers of a local union attempted to induce Empire [9] to refrain from selling its ice to certain retail ice peddlers who refused to join the local union. When Empire refused

to join the boycott of the peddlers, the union commenced peaceful picketing of Empire's premises. In upholding the trial court, which had issued an injunction against the union to cease its picketing, the State Supreme Court found that the union was striving to compel Empire to enter with it into an agreement which would amount to a violation of a state criminal statute.

The labor union argued in the United States Supreme Court that it had a constitutional right under the First Amendment to picket Empire's premises in conjunction with the labor dispute. The Court, Mr. Justice Black writing, replied:

> Aside from the element of disseminating information through peaceful picketers, . . . it is difficult to perceive how it could be thought that these constitutional guaranties afford labor union members a peculiar immunity from laws against trade restraint combinations, unless, as appellants contend, labor unions are given special constitutional protection denied all other people.[2]
>
> * * * *
>
> *It rarely has been suggested that the constitutional freedom of speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of* [10]. *a valid criminal statute. We reject the contention now.* Nothing that was said or decided in any of the cases relied on by appellants calls for a different holding.
>
> * * * *
>
> . . . it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language,

> either spoken, written, or printed. [Emphasis Added; Footnote Omitted]

336 U.S. 496-502. The Court unanimously upheld the injunction against the union.

Most recently the Supreme Court has had occasion to address itself to a controversy which appears strikingly similar to our own. In *Tinker v. Des Moines Independent Community School District, No. 21* (U.S., February 24, 1969), the petitioners were suspended from school for knowingly violating a regulation which forbade wearing an armband at school as a form of protesting American involvement in Vietnam. The petitioners filed their complaint in the District Court seeking an injunction and nominal damages against the school officials. The lower court dismissed the complaint and the Court of Appeals for the Eighth Circuit affirmed by an equally divided court.

[11] The Supreme Court reversed the dismissal of the complaint for the reason that the officials' action constituted a violation of petitioners' freedom of speech.

> . . . The wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. . . . It was closely akin to "pure speech" which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment. (Slip Opinion, pp. 2-3)

A serious examination of *Tinker,* however, reveals that it does not dictate the outcome of the instant case. The touchstone in both cases is the nature of the restriction that was thwarted by the demonstrators. In

Tinker the petitioners ignored a hastily-conceived regulation which had been promulgated by the school principals shortly before and in anticipation of the demonstration.

> Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities. (Slip Opinion, p. 5)

The distinction should now be evident. We are asked to consider the exercise of First Amendment rights against the background of a federal criminal statute.

We do not think that the statute prohibiting unlawful wearing of a military uniform must fall when it affects [12] incidentally the exercise of free speech. We agree with the Court in *Giboney* when it stated that the Constitution does not extend "its immunity to speech or writing used as an integral part of conduct in violation of valid criminal statute."[7]

We cannot say that the unauthorized wearing of a military uniform is on the same plain as the wearing of an armband. It does not constitute a "symbolic act" akin to "pure speech." The statute we are reviewing was narrowly drawn to prohibit certain conduct that infringes a substantial national interest in maintain-

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7. Not even Smith and Schacht question the validity of the statute, except as it has been applied to them. We have been unable to find any cases which discuss the validity and legislative purpose of the statute, but there do exist cases which examine related statutes. With respect to Section 32 of the Criminal Code of March 6, 1909 (false impersonation of an officer of the United States), the Court in *United States v. Barnow*, 239 U.S. 74, 80 (1915), said, "It is the aim of the section . . . to maintain the general good repute and dignity of the service itself." See also, *United States v. Lepowitch*, 318 U.S. 702 (1943); *United States v. Wight*, 176 F.2d 376 (2d Cir. 1949).

ing the dignity of the armed forces. Accord, *Cox v. Louisiana, supra,* at 564; contra, *Edwards v. South Carolina,* 372 U.S. 229, 236 (1963). Nor can it wisely be argued that the statute is vague. It forbids one type of conduct. Its language is plain and notice of its proscription is evident. *Adderley v. Florida,* 385 U.S. 39, 42 (1966).

As the Supreme Court stated thirty years ago, in *Schneider v. State,* 308 U.S. 147, 161 (1939):

> [13] Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.

See also, *Cameron v. Johnson,* 390 U.S. 611, 617 (1968).

II.

Smith and Schacht next argue that 10 U.S.C.A. §772(f) (1952),[8] an exception to the criminal statute discussed above, is unconstitutionally vague. They quarrel with the section which permits an actor in a "theatrical or motion picture production" to wear a military uniform unless his actions "tend to discredit that armed force." We do not consider such objection well-founded. The language of legislative grace is amply clear. Coupled with appropriate common-sense instructions by the judge, a jury would certainly be capable of reaching a rational decision concerning the appellants' activities.

III.

Following Appellant Smith's conviction and judgment of guilt the trial judge placed him on three

8. See footnote #3.

years' probation with certain special conditions attached. In exchange for the privilege of probation Smith was required to "forego any association whatever with the Students for Democratic Society Organization," and to "Discontinue your association with [14] the member of the Humanists group with which you violated the law." Smith argues that these strictures violate his First Amendment rights of expression and assembly.

18 U.S.C.A § 3651 (1964) authorizes the trial court to place a criminal defendant on probation "for such period and upon such terms and conditions as the court deems best." Congress obviously intended by means of the broad statutory language to invest the court with great discretion to establish conditions which would lead to the defendant's ultimate acceptance by society. *Barnhill v. United States,* 279 F.2d 105 (5th Cir. 1960), cert. denied, 364 U.S. 824 (1960). Smith could have rejected probation and elected prison. He chose to enjoy the benefits of probation; he must also endure its restrictions. The trial court did not abuse its discretion in attaching the special conditions to Smith's probation.

AFFIRMED.

GOLDBERG, Circuit Judge, concurring specially:

Though concurring in the result my brothers have reached, I am impelled to uphold this conviction through a slightly different constitutional approach. I am less impressed by the distinction between speech and conduct than I am by the fact that the statute before us has a legitimate nonspeech objective.

I begin by noting that the statute under which the present conviction was obtained operates to preserve [15] the integrity of the military uniform by restricting its use to authorized persons. Whatever the object of such a restriction, whether to protect against the possibility of military impersonation, or simply to safeguard the need for a sure and expedient means of military identification, the restriction nonetheless has only the most remote and incidental effect upon free speech.

In order better to illustrate the remoteness of this impact on First Amendment rights, the present case is usefully compared to *O'Brien v. United States,* 1968, 391 U.S. 367, ____S.Ct.____, 20 L.Ed.2d 672. In *O'Brien* the Supreme Court held that a prohibition against the knowing mutilation or destruction of a draft card was not unconstitutional as applied to one who burned his draft card in protest against the war in Vietnam. The Court based its decision in large measure on the fact that the government had a substantial nonspeech related interest in seeing that draft cards were not destroyed.[1]

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1. "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest." 20 L.Ed.2d at 679-680.

* * *

". . . the governmental interest and the operation of the 1965

The government interest in seeing that uniforms are not worn by unauthorized persons is also nonspeech oriented. It is no more affected by the use of the uniform as a vehicle of protest than was the governmental interest in draft cards. In fact, it is reasonable to say that the statute before us has an even less inhibiting effect on free speech than the statute in [17] *O'Brien*. At least the statute before us enjoins only the *wearing* of a military uniform, not its destruction. As such its violation is complete when the uniform is donned. The subsequent use of the uniform for protest purposes is entirely irrelevant to the statute's real objectives. These objectives

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Amendment are limited to the noncommunicative aspect of O'Brien's conduct. The governmental interest and the scope of the 1965 Amendment are limited to preventing a harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted.

"The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. In Stromberg v. California, 283 U.S. 359, 75 L.Ed. 1117, 51 S.Ct. 532, 73 A.L.R. 1484 (1931), for example, this Court struck down a statutory phrase which punished people who expressed their 'opposition to organized government' by displaying 'any flag, badge, banner, or device.' Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct. See also, NLRB v. Fruit & Vegetable Packers Union, 377 U.S. 58, 79 (concurring opinion) 12 L.Ed.2d 129, 142, 84 S.Ct. 1063 (1964).

"In conclusion, we find that because of the Government's substantial interest in assuring the continuing availability of issued Selective Service certificates, because amended §462(b) is an appropriately narrow means of protecting this interest and condemns only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of O'Brien's act of burning his registration certificate frustrated the Government's interest, a sufficient governmental interest has been shown to justify O'Brien's conviction." 20 L.Ed.2d at 683.

require that the patriot no less than the revolutionary, the bystander no less than the protester, forego the unauthorized wearing of the uniform. First Amendment rights do not suffer by the enforcement of such a statute.

Nothing in *Tinker v. Des Moines Independent Community School District*, 1969, 37 U.S.L.W. 4121, affects the constitutionality of the statute before us. In *Tinker* a school regulation banning the wearing of armbands to school was declared unconstitutional as an unreasonable restriction on free speech. While it seems plausible to say that the armband was no more or less a symbol of protest to its wearers than was the uniform in the case before us, the armbands, unlike the uniform and the draft cards, were not appendant to any valid governmental interest.

There was, to be sure, a valid governmental interest in *Tinker* that required the preservation of order and discipline within the school, and this the Court acknowledged. But this interest was no more derivative from or inherent in armbands than in purely verbal criticism of the Vietnam war. In short, armbands are "akin to pure speech," 37 U.S.L.W. at 4122, because they generate no governmental interest apart from the message they communicate.

[18] Uniforms and draft cards, on the other hand, are essential to purposes and perform secondary functions which have nothing to do with free speech. Since regulation of their use is not designed to also regulate attitudes toward them, *cf. Stromberg v. California*, 1931, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117, their enforcement will not imperil First Amendment freedoms. I am

convinced that the statute before us was not conceived in the suppression of freedom of expression. I must therefore conclude that its nullification cannot be justified because its violation was birthed in protest.

I would also affirm the judgment of the district court.

IN THE

Supreme Court of the United States

October Term, 1969

No. 628

DANIEL JAY SCHACHT, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

MOTION FOR LEAVE TO SUBMIT PETITION FOR WRIT OF CERTIORARI OUT OF TIME

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IN THE

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v.

UNITED STATES OF AMERICA, *Respondent*

MOTION FOR LEAVE TO SUBMIT PETITION FOR WRIT OF CERTIORARI OUT OF TIME

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Comes now the Petitioner, DANIEL JAY SCHACHT, through his attorneys, DAVID H. BERG and ARTHUR MANDELL, and respectfully requests the Court to grant this Motion for leave to submit his Petition out of time, for the following reasons:

I.

Petitioner, a layman, relied on his attorney of record before the United States Court of Appeals for the Fifth Circuit, who was asigned the duty to file his Petition for

Writ of Certiorari timely, (Tr. 16, 39), failed to do so, thus denying Petitioner his right to Petition this Court for such Writ, thus depriving him proper legal representation as guaranteed under the Sixth Amendment of the United States Constitution.

II.

Petitioner did not retain the attorney who represented him before the United States Court of Appeals for the Fifth Circuit and who was to have filed the Petition for Writ of Certiorari before the United States Supreme Court (Tr. 9, 16, 26, 41). The Houston Chapter of the American Civil Liberties Union contacted the cooperating Attorney Gray, who then agreed to represent Petitioner in the appellate court, including the Supreme Court of the United States, as noted by his assistant, Attorney Bob Hunt (Tr. 26), at a hearing on this matter, held on September 2, 1969, before The Honorable James Noel, United States District Judge for the Southern District of Texas (Tr. 1).

III.

The American Civil Liberties Union Attorney Gray had his assistant, Bob Hunt, contact Petitioner by telephone to inform him that time was running out on the filing of the Petition for Writ of Certiorari, and that he must therefore either come up with some money or sign a Pauper's Oath (Tr. 30); Petitioner, however, was never informed of the date for filing (Tr. 7, 31, 45), even by the United States Court of Appeals for the Fifth Circuit (Tr. 7), and awaited in vain for further contact from Gray or Hunt to comply with their wishes concerning the filing of the Petition (Tr. 7).

At the above-mentioned hearing, American Civil Liberties Union Attorney Gray testified: That he let the date go by because he didn't want to put up the money (Tr. 38); that he never corresponded with Petitioner about the deadline (Tr. 40); and that the ACLU did not seem interested in putting up the money (Tr. 41). Gray's assistant Hunt testified: That he, Hunt, did not ask the ACLU for any money, and was "not going to ask the American Civil Liberties Union for nothing (sic)." (Tr. 31).

Yet, Dr. Clark Read, Chairman of the Houston Chapter of the ACLU, testified he told Mr. Gray the ACLU would finance the expense of an appeal in this case to the Supreme Court (Tr. 16).

Petitioner relied upon Counsel to perfect the appeal (Tr. 11) and therefore never apprised himself of the deadline for filing of the Petition for Writ of Certiorari (and never knew the deadline had passed until he received an order, on August 29, 1969, to surrender himself), or of the method of proceeding on Motions and Writs *pro se;* he was in fact ignorant of these matters until the date he prepared his affidavit in support of this Motion. Petitioner made no attempt to obtain other Counsel until after the deadline passed (Exhibit A).

IV.

American Civil Liberties Union Cooperating Attorney Gray did nothing about the filing of the Petition for Writ of Certiorari other than to obtain an extension of time to file the Petition (Tr. 35). The Petition for Writ of Certiorari and accompanying Motion were prepared by

Petitioner's present attorney Berg only after he entered the case, which entrance was subsequent to the execution of the order that Petitioner surrender himself to the United States Marshal, dated August 28, 1969, and formally accepted by the Court at the hearing referred to above on September 2, 1969 (Tr. 12).

V.

The Transcript of the record and judgment of the District Court, along with the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit (Vols. I and II), were prepared by the Clerk of the Fifth Circuit Court of Appeals and sent to prior Counsel; these records, prerequisite to the filing of a Petition for Writ of Certiorari were made available to present Counsel on September 9, 1969 (Exhibit E).

VI.

The arrest and conviction of Petitioner, DANIEL JAY SCHACHT, raises grave Constitutional questions concerning the First and Fifth Amendments to the Constitution of the United States which reach far into our changing times. If a dissident member of the younger generation, protesting his country's involvement in the Vietnamese war, is to be denied his final appeal because of the incompetency of Counsel, or, failing that, his own justifiable inattentiveness to the details of dates and methods of filing the Petition, none of the questions which torture our country's spirit will be answered and nothing will be accomplished save the creation of an ideological criminal by silencing a dissenting voice.

Petitioner Schacht is presently serving a six-month sentence.

Respectfully submitted,

David H. Berg

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CA 5-9021

Attorneys for Petitioner

APPENDIX A

AFFIDAVIT

STATE OF TEXAS §
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this date personally appeared DANIEL JAY SCHACHT; who, being by me duly sworn, on his oath states:

I, DANIEL JAY SCHACHT, of 4506 Cosby, Houston, Harris County, Texas, give the following statement concerning the matter of my appeal before the Supreme Court of the United States of America:

After my conviction for the unauthorized wearing of the uniform of the Armed Forces of the United States, I contacted the American Civil Liberties Union about representation on appeal. Approximately one month after my sentence, the American Civil Liberties Union, through its local president, Dr. Clark Read, contacted me to inform me that Mr. Will Gray, their cooperating attorney, would handle my appeal to the Fifth Circuit Court of Appeals and if he was unsuccessful there, would carry the appeal to the Supreme Court of the United States. I met with Mr. Gray during that period of time on one occasion, during which he assured me he would handle my appeal. I never saw Mr. Gray again.

After the affirmation of my conviction in the Fifth Circuit Court of Appeals, I was informed by Mr. Gray's associate, Mr. Bob Hunt, that an appeal would be taken to the Supreme Court of the United States. I trusted the ACLU attorney completely, and never bothered to apprise

myself of the deadline for filing the Writ of Certiorari or the manner in which I might personally file Writs and Motions. In fact, I did not know I was authorized to file my own Motions and Writs until informed of such by my new attorney for purposes of giving this statement.

I did not know the date for filing the Writ of Certiorari had run out until I was ordered to report to the United States Marshal in Houston, Texas, on September 2, 1969, at 8:30 a.m. I did so, and am presently serving my sentence.

Had I known Will Gray would not have filed the Petition on time, I certainly would have retained Counsel as I have since done after discovering the Writ was never filed.

DANIEL JAY SCHACHT

SWORN TO and SUBSCRIBED before me by the said DANIEL JAY SCHACHT on this the 5th day of September, 1969, to certify which, witness my hand and seal of office.

(SEAL)

Notary Public in and for Harris County, Texas.

APPENDIX B

STATE OF TEXAS §

COUNTY OF HARRIS §

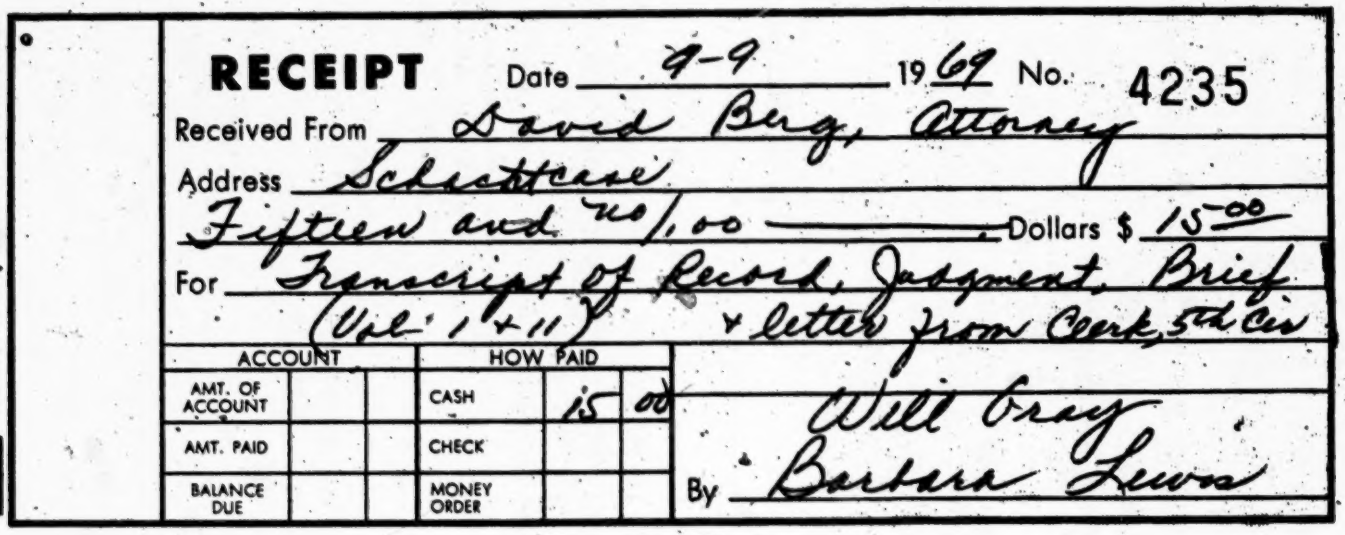
BEFORE ME, the undersigned authority, personally appeared DAVID H. BERG, who, being by me first duly sworn, on his oath states:

That the facts and things set out in the above and foregoing Motion pertaining to DAVID H. BERG, referred to in the Motion as Petitioner's present Counsel, are true and correct.

David H. Berg

SWORN TO and SUBSCRIBED before me by the said DAVID H. BERG on this the ____ day of September, 1969, to certify which, witness my hand and seal of office.

Notary Public in and for Harris County, Texas.



RECEIPT Date 9-9 19 69 No. 4235

Received From David Berg, Attorney

Address Schattcane

Fifteen and no/100 Dollars $ 15-00

For Transcript of Record, Judgment, Brief (Vol. I + II) + letter from Clerk, 5th Cir

ACCOUNT			HOW PAID		
AMT. OF ACCOUNT			CASH	15	00
AMT. PAID			CHECK		
BALANCE DUE			MONEY ORDER		

Will Gray

By Barbara Lewis

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 628

DANIEL JAY SCHACHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 15-30) is reported at 414 F. 2d 630.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1969. No extension of time within which to file a petition for a writ of certiorari was either requested or obtained. The instant petition, filed on

September 22, 1969, is thus substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

18 U.S.C. 702 provides:

> Whoever, in any place within the jurisdiction of the United States or in the Canal Zone, without authority, wears the uniform or a distinctive part thereof or anything similar to a distinctive part of the uniform of any of the armed forces of the United States, Public Health Service or any auxiliary of such, shall be fined not more than $250 or imprisoned not more than six months, or both.

10 U.S.C. 772(f) provides:

> While portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force if the portrayal does not tend to discredit that armed force.

QUESTION PRESENTED

Whether petitioner was constitutionally convicted of violating 18 U.S.C. 702—which proscribes the wearing of distinctive portions of a military uniform by a civilian—where he was so attired at a street demonstration protesting the Vietnam conflict, during which he performed a brief skit which, he contends, fell within the exception provided in 10 U.S.C. 772(f).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of the unauthorized wearing of distinctive parts of an Armed Forces uniform, in violation of 18 U.S.C. 702. On February 29, 1968, he was sentenced to imprisonment for six months and fined $250. The court of appeals affirmed.

1. The evidence showed that on the morning of December 4, 1967, a group of persons gathered in front of the Selective Service induction station in Houston, Texas, to protest against the Vietnam conflict (R. 120-121).[1] During the course of this demonstration, which lasted from 6:30 to 8:30 a.m., petitioner and co-defendant Jarrett Vander Smith were observed wearing distinctive portions of the uniform of the United States Army. Petitioner wore a blouse of the type currently authorized and issued to Army enlisted men, bearing a shoulder patch designating service in Europe. The buttons on the blouse also were of a distinctive military design. On his head petitioner wore an outmoded military hat. Affixed to the hat in an inverted position was the eagle insignia currently worn on the hats of Army officers (R. 183, 222). Smith was wearing an Army blouse or jacket which had official military buttons. Neither petitioner nor Smith were members of the Armed Forces at the time they wore these items.

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[1] "R." refers to the one-volume "Record on Appeal," which has been filed with the Clerk of this Court.

2. Petitioner admitted wearing these portions of the military uniform. He and other defense witnesses testified that in the course of the demonstration, petitioner and another individual impersonated soldiers in a skit designed to show that the American presence in Vietnam was wrong. In the skit they carried water pistols filled with red ink and chased after a third performer, who was dressed in a black robe and a coolie-type hat. After "shooting" their prey, petitioner and his comrade would walk up to him and pretend to discover that the "victim" was a pregnant woman (R. 265). The three participants had rehearsed their skit prior to the demonstration, and had performed it one or two days before in front of a student club at the University of Houston (R. 275, 317-319). A newspaper reporter covering the demonstration testified that the skit was performed three or four times, each performance lasting no longer than three minutes (R. 265, 269-270). The individual who portrayed the Vietnamese woman claimed that the skit was performed continuously throughout the course of the demonstration (R. 277). Government witnesses who had seen petitioner at the demonstration declined to characterize his conduct as a role in a play; they testified merely that in the course of the demonstration petitioner and the other individuals chased each other in a manner resembling horseplay rather than play-acting (R. 122, 130, 162-163, 181-182).

3. In the closing charge to the jury the court read verbatim the language of 10 U.S.C. 772(f) and defined the words "portrayal", "theatrical", and "dis-

credit" (R. 409-412). The jury was told that it must acquit petitioner if it found that he wore parts of the military uniform while performing a theatrical production which did not tend to discredit the Armed Forces (R. 412).

ARGUMENT

As noted, the petition for a writ of certiorari is out of time by some 100 days.[2] In any event, it presents no issue warranting further review.

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[2] Petitioner has filed with the Court a motion for leave to file an untimely petition, in which he seeks to explain that the delay was not his fault. Petitioner alleges that following conviction he consulted the local chapter of the American Civil Liberties Union, which agreed to handle his case on appeal although he was not indigent. The A.C.L.U. referred him to Mr. Gray, who represented him without cost throughout the course of his appeal in the Fifth Circuit, and filed a motion to stay the mandate following affirmance. This attorney, however, refused to bear the expense of perfecting an application for review by this Court. Petitioner alleges that Mr. Gray never informed him of the failure of the A.C.L.U. to provide the necessary funds for filing a petition for a writ of certiorari; that he was in fact ignorant of the deadline for filing a timely petition; that he relied completely upon counsel to protect his appellate rights; and that he did not learn of the failure to provide this protection until August 29, 1969, when he received an order from the United States Marshal to surrender himself. At a hearing in the district court on September 2, 1969, testimony was received from petitioner, Mr. Gray and his associate, and from a representative of the A.C.L.U. The court then denied release on bail and ordered petitioner to commence service of his sentence. The transcript of this hearing has been filed with the Clerk of this Court. Following the filing of the petition for a writ of certiorari, the district court, on October 7, 1969, admitted petitioner to bail in the amount of $2,000.

1. Petitioner's principal challenge is not actually directed at the statute underlying his conviction—18 U.S.C. 702—at least insofar as it proscribes the wearing of the uniform by a person not a member of the Armed Forces in situations other than a theatrical production. He acknowledges that he was not a member of the Army when he wore the military regalia at the demonstration. He claims, however, that he was entitled to wear those items because he was portraying a member of the Armed Forces in a theatrical production, within the meaning of 10 U.S.C. 772 (f), and that, insofar as that statute authorizes the wearing of the military uniform only in those productions which do not "tend to discredit that armed force," it violates freedom of expression as protected by the First Amendment and due process as guaranteed by the Fifth Amendment. The thrust of petitioner's argument, therefore, is primarily directed against that specific clause in the statute, which he contends to be unconstitutional.

Whatever merit this contention might have, the instant case does not present an appropriate situation in which to consider it, since petitioner's conduct failed to fall within Section 772(f) at all. This is made abundantly clear by an examination of that provision and its legislative history. The source of 10 U.S.C. 772(f) is Section 125 of the National Defense Act of 1916 (39 Stat. 166, 216-217), which read in pertinent part:

> It shall be unlawful for any person not an officer or enlisted man of the United States Army * * * to wear the duly prescribed uniform of the

> United States Army * * * or any distinctive part of such uniform, or a uniform any part of which is similar to a distinctive part of the duly prescribed uniform of the United States Army * * *: *Provided*, That the foregoing provision shall not be construed so as * * * to prevent any person from wearing the uniform of the United States Army * * * in any playhouse or theater or in moving-picture films while actually engaged in representing therein a military * * * character not tending to bring discredit or reproach upon the United States Army * * *.

The wording of Section 125 was not altered until 1956, when Titles 10 and 32 of the United States Code underwent a complete revision for the purpose of combining all of the laws affecting the Armed Forces in one section of the United States Code, eliminating duplicate statutes and obsolete verbiage, and clarifying certain statutory language. The sponsors emphasized, however, that no changes of substance had been intended by the revision.[8] In the revised code, the proviso portion of Section 125 was reworded and became 10 U.S.C. 772(f). The sole purpose of the restatement was to remove the negative character of the provision and thus "to make positive the authority of the persons described * * * to wear the uniform prescribed for the appropriate organization or activity." H. Rep. 970, 84th Cong., 1st Sess., pp. 52-

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[8] See the testimony of Dr. F. Reed Dickerson, Office of the General Counsel of the Department of Defense, Hearing before a Subcommitte of the Senate Committee on the Judiciary on H. R. 7049, 84th Cong., 2d Sess., pp. 15-16; Statements of Senators O'Mahoney and Wiley, 102 Cong. Rec. 13944, 13953 (July 28, 1956); and H. Rep. 970, 84th Cong., 1st Sess., p. 8.

53. The "theatrical production" exception was not extended to include conduct such as that engaged in by petitioner, but continued to be limited to performances in playhouses, theaters, or motion pictures—a logical exemption for situations where the audience is completely and unequivocally aware that the individuals portraying military figures are merely *actors*, and not what they appear to be.

By allowing the jury to consider the effect of 10 U.S.C. 772(f) on the question of guilt, the trial judge extended to petitioner an unnecessary gratuity. The jury nevertheless convicted petitioner of violating 18 U.S.C. 702, and the evidence amply supports that finding. In these circumstances, there is no occasion for review of an argument having no foundation in the evidence adduced at trial.

2. Petitioner also attacks the validity of Section 702 on constitutional grounds. As to this challenge, we rely on the majority and concurring opinions in the court below for the proposition that Congress can lawfully prohibit *conduct* which conveys ideas so long as a valid governmental interest is thereby served (see Pet. App. 19-25, 27-30). *E.g.*, *United States* v. *O'Brien*, 391 U.S. 367.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1969.

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NO. 628

IN THE

Supreme Court of the United States

October Term, 1969

DANIEL JAY SCHACHT, *Petitioner*

v.

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINION BELOW

The Opinion of the Circuit Court of Appeals, printed in Appendix C of the Petition for Writ of Certiorari in this cause, is reported at 414 F.2d 630.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 14, 1969 (R. 454). No Motion for Rehearing was filed. The Petition was granted December 15, 1969. The jurisdiction of this Court invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Are 18 U.S.C. §702 and 10 U.S.C. §772(f) supported by any compelling nonspeech governmental interest justifying limitation upon First Amendment rights of free speech?

II. Is the statutory scheme created by 18 U.S.C. §702 and 10 U.S.C. §772(f), a prior restraint, and/or an overbroad, vague, and indefinite impingement upon First and Fifth Amendment rights of free speech and due process?

III. Have 18 U.S.C. §702 and 10 U.S.C. §772(f) been unconstitutionally applied against Petitioner?

STATUTES INVOLVED

The statutory provisions involved are Title 18, U.S.C., Crimes and Criminal Procedure, §702, and Title 10, U.S.C., Armed Forces, §772(f).

STATEMENT

Petitioner was tried and convicted in the District Court for the unauthorized wearing of a distinctive part of an Armed Forces uniform.

In the District Court Petitioner attacked the Constitutionality of both 18 U.S.C., §702, and 10 U.S.C., §772 (f) and the constitutionality of their application to him, by his Motion to Quash indictment (R. 11-17).

The evidence, which is not in dispute, showed that the Petitioner took part in a nationally coordinated protest against the Vietnamese war in front of the Armed Forces

Induction Center in downtown Houston, Texas, from about 6:30 a.m. to 8:30 a.m. on December 4, 1967 (R. 101).

Petitioner wore a "fur felt Army officer's cap on his head with the strap loose and hanging down, and with an Army officer's insignia upside down. On his body * * * he had an Army green shade 44 enlisted blouse with a U. S. Army Europe patch on the left shoulder." (R. 173). The buttons on the blouse were "current authorized buttons." (R. 177). The blouse itself, and the eagle insignia on the cap were also current issue (R. 437). According to his own testimony, Petitioner was wearing "a pair of civilian boots, green civilian pants, a belt with silver buckle, regular shirt, dress green, rank insignia U. S. Army removed, no lapels, and the obsolete hat, World War II hat. The insignia was upside down, one strap was dangling." (R. 319).

Petitioner and others had practiced a skit concerning the Vietnamese war which they then presented before the Induction Center (R. 275, 276).

A newspaper reporter, present at the time, testified:

> "One would say, 'Be an able American,' and they would shoot the Viet Cong, and he would fall to the pavement, and they would walk up to the third person and kick the cape aside and say, 'My God, this is a pregnant woman.'" (R. 265)

Petitioner's point in taking part in the skit was to display his and the group's disapproval of the involvement of the United States Army in Vietnam (R. 334).

Subsequent to the above-described conduct, Petitioner was arrested and charged with violation of 18 U.S.C., §702. Petitioner was convicted on February 15, 1968, and sentenced to six (6) months to be served on March 4, 1968.

On appeal to the United States Court of Appeals for the Fifth Circuit, the Petitioner raised the same questions concerning the constitutionality of the statutes and of their application to him as were raised by the Motion to Quash the Indictment in the District Court. The Fifth Circuit Panel affirmed the conviction and sentence of Petitioner, resting its Opinion on Petitioner's violation of 18 U.S.C., §702, and dismissing any argument that the Act(s) are unconstitutional or unconstitutionally applied (R. 447, 448).

SUMMARY OF ARGUMENT

The conviction of the Petitioner, under 18 U.S.C. §702 and 10 U.S.C. §772(f) is repugnant to the First and Fifth Amendments to the United States Constitution when tested by all traditional Supreme Court standards; in short, Petitioner was subjected to prosecution because he expressed unpopular political views.

ARGUMENT

I.

18 U.S.C. §702 and 10 U.S.C. §772(f) are supported by no compelling nonspeech governmental interest to justify any limitation on First Amendment rights of free speech.

During the last decade, the language of protest and dissent in our society has undergone a metamorphosis from

purely written or spoken communication to communication by a combination of pure and symbolic speech. This Court has not failed to take account of that metamorphosis and has over the years reaffirmed its holding in *Stromberg v. California,* 283 U.S. 359, that attempts to regulate speech under the guise of regulating conduct suffer from a constitutional infirmity. See, e.g., *Shuttlesworth v. City of Birmingham, Ala.,* ___ U.S. ___, (Mar. 10, 1969); *Gregory v. City of Chicago,* ___ U.S. ___, (Mar. 10, 1969); *Tinker v. Des Moines Ind. Community School Dist. No. 21,* ___ U.S. ___, (Feb. 24, 1969); *Brown v. Louisiana,* 383 U.S. 131; *Cox v. Louisiana,* 379 U.S. 536; *Edwards v. South Carolina,* 372 U.S. 229. Surely Petitioner's right to condemn United States' involvement in Vietnam should be welcome and necessary in a society that has traditionally protected under its constitution the expression of unpopular views. *Stromberg v. California,* supra; *Edwards v. South Carolina,* supra; *Terminiello v. Chicago,* 337 U.S. 1; *West Virginia v. Barnette,* 319 U.S. 624.

Carte blanche protection of all speech-related action is however unavailable. As held in *United States v. O'Brien,* 391 U.S. 367, regulation of conduct which incidentally limits First Amendment freedoms is sufficiently justified,

> "if it is within the constitutional power of the Government; if it furthers an important governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. . ." *United States v. O'Brien, supra* at 377.

It was precisely this principle which prompted Judge Goldberg's concurrence in the Fifth Circuit Court of Appeals' affirmance of Petitioner's conviction under 18 U.S.C. §702.[1] Yet Judge Goldberg found it difficult to precisely delineate the nonspeech interest furthered by 18 U.S.C. §702 which was so "compelling," "substantial," "subordinating," "paramount," "cogent," or "strong," (*United States v. O'Brien*, supra, at 376-7), as to justify limitations upon Petitioner's First Amendment freedom:

> "Whatever the object of such a restriction, whether to protect against the possibility of military impersonation, or simply to safeguard the need for a sure and expedient means of military identification, the restriction nonetheless has only the most remote and incidental effect upon free speech." *United States v. Schacht*, 414 F.2d 630 at 636-7.

Not only was it difficult for the one judge who recognized the problem to pinpoint the compelling governmental interest necessary to justify this regulation of conduct which he acknowledged affected free speech (albeit "the most remote and incidental effect"), but also Congress has itself demonstrated a recognition that the governmental interest in regulating the unauthorized wearing of distinctive parts of an armed forces uniform is not substantial or compelling by limiting its own proscription of that conduct. Thus, Congress has provided in 10 U.S.C. 772(f) that an actor in a theatrical or motion-picture production may wear an armed forces uniform if his portrayal does not "tend to discredit" that armed force. Petitioner would urge that an examination of this language compels the conclusion that the Title 18 limitation

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1. 18 U.S.C. §702, and its exception, 10 U.S.C. §772(f) are reproduced in Appendix A.

was not motivated by a nonspeech objective. How is it possible to justify on nonspeech grounds, a regulation which prohibits wearing of the uniform in a dramatic portrayal only if the portrayal "tends to discredit" the armed forces?

The lack of compelling governmental interest in controlling the wearing of distinctive parts of an armed forces uniform is particularly exemplified by the fact that the Government has authorized indiscriminate sale to the general public of all parts of armed forces uniforms (R. 243). Should it be argued that notwithstanding the federally created license to purchase all parts of armed forces uniforms, there nevertheless exists a compelling governmental interest in preventing the wearing of those uniforms, it would be logical to assume that one would find a plethora of convictions under the statutes here under attack. Such is not the case however, for prior to the cause at bar, only four convictions have been reported, the latest in 1949.

In short, the Government in prosecuting Petitioner Danny Schacht has engaged in a practice continually and vigorously denounced by this Court, the regulation of speech under the guise of regulating conduct. (See argument and authorities cited, *supra*, p. 5).

II.

The statutory scheme created by 18 U.S.C. 702 and 10 U.S.C. 772(f) is, in addition to being a prior restraint, an overbroad, vague, and indefinite impingement upon First and Fifth Amendment rights of free speech and due process.

Assuming, *arguendo*, that a substantial governmental nonspeech interest in regulating the wearing of distinctive

parts of an armed forces uniform may be demonstrated sufficient to justify incidental limitations on Petitioner's First Amendment freedoms, it is nevertheless clear that those limitations must be "no greater than is essential to the furtherance of that interest." *United States v. O'Brien, supra,* at 377. Congress recognized the danger of overbreadth which would attend a blanket proscription against wearing distinctive parts of a military uniform by enacting the Title 10 exception; yet Congress itself emasculated this limited grant of protection to oral and symbolic speech by saddling the Title 10 exception with the requirement that those wearing distinctive parts of armed forces uniforms in theatrical or motion-picture productions, reflect either credit or nothing at all on the uniform involved.

The objection to this statutory scheme in which Petitioner has become ensnared is twofold.

First, the questions raised by the imprecision of 18 U.S.C. 702 and 10 U.S.C. 772(f) are myriad. What does "discredit" mean? What does "tend to discredit" mean? By whom and when are these questions to be answered? Why is the uniform of the Coast Guard excepted from the exception? What is a theatrical or motion-picture production? Is a skit under the trees protected? By virtue of these unanswerable questions, a potential communicator is placed in the constitutionally untenable position of having either to purchase certainty by refraining from engaging in what may very well be constitutionally protected activity, cf. *Dombrowski v. Pfister,* 380 U.S. 479, or to join the ranks of "those hardy enough to risk criminal prosecution [and conviction] to determine the proper scope of regulation." *Dombrowski v. Pfister,* supra, at

487. See also *Near v. Minnesota,* 283 U.S. 697. Such uncertainty renders the statutory scheme void for indefiniteness. *Winters v. New York,* 333 U.S. 507.

Having been subjected to criminal prosecution subsequent to his participation in the anti-Vietnam skit, Petitioner might as well have been subjected to a judicial or administrative determination of the statutory significance of his role and costume before he engaged in the activity. For as *Near v. Minnesota,* supra, teaches such post-speech litigation subjects one such as Petitioner to no less than a classical prior restraint on his free speech.

Secondly, even were the Fifth Circuit Court of Appeals correct in its conclusion that "the language of legislative grace is amply clear," *United States v. Schacht, supra,* at 636, it would nevertheless be an inescapable conclusion that the statutory scheme suffers from overbreadth. It can hardly be denied that today criticism or derision of any institution of government is guaranteed by the First Amendment (discussed *supra* at p. 5), and statutory schemes which are drawn so broadly as to include within their scope or proscription just such constitutionally protected areas of free speech, have been struck down by this Court so many times that the validity of any argument to the contrary is foreclosed. *Shuttlesworth v. Birmingham, supra; Brown v. Louisiana, supra; Cox v. Louisiana, supra; Edwards v. North Carolina, supra; Garner v. Louisiana,* 368 U.S. 157; *Stromberg v. California, supra.*

To thwart any contention that the objection to the statutory scheme would be cured by simply voiding the Title 10 exception, one need only consider the overbreadth and imprecision that inheres in 18 U.S.C. §702 standing alone.

For instance, what constitutes a distinctive part of an armed forces uniform? From whom does one obtain authority to wear the uniform? The vagueness of this statute offends due process requirements of clarity and notice. *Winters v. New York, supra.* But even more important, Congress explicitly recognized an area of free speech into which its proscription concerning the wearing of distinctive parts of an armed force uniform should not reach, i.e., the drama; should 10 U.S.C. 772(f) be voided, 18 U.S.C. 702 undoubtedly would reach this protected area.

III.

18 U.S.C. §702 and 10 U.S.C. §772(f) have been unconstitutionally applied against Petitioner.

Because the statute under which Petitioner was convicted is so broad, there exists the danger that 18 U.S.C., §702 and 10 U.S.C., §772(f) may be applied in an uneven and discriminatory fashion. *Brown v. Louisiana, supra; Edwards v. South Carolina, supra; Shuttlesworth v. Birmingham, supra.* What Petitioner, Danny Schacht did was to publicly present his private suspicion that Vietnamese civilians were the victims of American military action — a suspicion which, in light of recent disclosures concerning alleged military massacres in Vietnam, might very well be justified; in any event, his expressed views of the war were not calculated to win favor with the Government. Thus, at the whim of the United States Attorney, 18 U.S.C. §702 was resurrected for the sole purpose of quieting a dissident, perhaps prophetic, voice. The law involved then became a deadly governmental

weapon ". . . deliberately and purposefully applied solely to terminate the reasonable, orderly and limited right to protest . . ." *Brown v. Louisiana, supra,* at 724.[2]

It is also well settled that statutes constitutional on their face may nevertheless be applied unconstitutionally. *Yick Wo v. Hopkins,* 118 U.S. 346. Thus, Petitioner contends that should the statutes be declared facially valid, his conviction should nevertheless be reversed because the statute was unlawfully applied against him.

Petitioner's conviction is only the fifth reported under the statute and the first since 1949 (*supra*). This is not the only evidence of disuse of and disinterest in the statute: the Government permits sale of armed forces uniforms to the general public (*supra*), and has failed to prosecute the multitude of citizens wearing distinctive parts of armed forces uniforms, e.g., hunters in their Navy pea jackets, teenagers in their Army raincoats, and for that matter, uniformed actors who make fools of the officers they portray, e.g., the portrayal of General Turgidson in *Dr. Strangelove,* and of Sergeant Bilko in *"You'll Never Get Rich."*

The conclusion demanded is that the prosecution of this Petitioner for the wearing of distinctive parts of the United States Army uniform in an anti-Vietnam skit was arbitrary and deprived Petitioner of his fundamental right of freedom of speech under the First Amendment and of the basic guarantee of equal protection under the law implicit in the due process clause of the Fifth Amendment. *Bolling v. Sharp,* 347 U.S. 497.

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2. A careful examination of the record reveals that the demonstration was unquestionably peaceful and orderly.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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DAVID H. BERG

Stuart M. Nelkin
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Chris Dixie
CHRIS DIXIE
Counsel for Petitioner

February, 1970

MOTION TO ALLOW APPEARANCE PRO HOC VICE

COMES NOW CHRIS DIXIE, a member of this Bar, and moves this Honorable Court to allow DAVID H. BERG and STUART M. NELKIN, attorneys for Petitioner herein, the opportunity to argue this case before this Court *pro hoc vice*, inasmuch as Attorneys Berg and Nelkin have not practiced long enough to satisfy the requirements of membership before the Supreme Court Bar.

Respectfully submitted,

Chris Dixie
CHRIS DIXIE

APPENDIX A

Title 18 U.S.C. Sec. 702

Whoever in any place within the jurisdiction of the United States or the Canal Zone, without authority, wears the uniform or a distinctive part thereof or anything similar to a distinctive part of the uniform of any of the armed forces of the United States, Public Health Service, or any auxiliary of such, shall be fined not more than $250 or imprisoned not more than six months, or both. June 25, 1948 c. 645, 62 Stat. 732; May 24, 1949, c. 139, Sec. 15(a), 63 Stat. 91.

Title 10 U.S.C. Sec. 772(f)

While portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force if the portrayal does not tend to discredit that armed force. Title 10, U.S.C., §772(f).

APPENDIX B

FIRST AMENDMENT

Congress shall make no law restricting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment for indictment of a Grand Jury, except in cases arising in land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 628

DANIEL JAY SCHACHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 57–71) is reported at 414 F. 2d 630.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1969. A motion for leave to file a petition for a writ of certiorari out of time and the petition for a writ of certiorari were filed on September 22, 1969, and were granted on December 15, 1969 (A. 72; 396 U.S. 984). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). We discuss *infra,* pp. 9–21, a question as to the jurisdiction of the Court to entertain the untimely petition in this case.

QUESTIONS PRESENTED

1. Whether the Court has jurisdiction in this case notwithstanding the untimeliness of the petition.

2. Whether Congress, under a statute of general applicability, may constitutionally prohibit the wearing by civilians of distinctive parts of the uniform of the armed services in the circumstances of this case.

3. Whether the wearing of the uniform in a street protest demonstration, as part of which a brief skit was performed, was within the statutory exemption provided in 10 U.S.C. 772(f) for an actor portraying a member of the Army in a theatrical or motion-picture production.

STATUTES INVOLVED

18 U.S.C. 702 provides:

> Uniform of armed forces and Public Health Service.
>
> Whoever, in any place within the jurisdiction of the United States or in the Canal Zone, without authority, wears the uniform or a distinctive part thereof or anything similar to a distinctive part of the uniform of any of the armed forces of the United States, Public Health Service or any auxiliary of such, shall be fined not more than $250 or imprisoned not more than six months, or both.

10 U.S.C. 772 provides in pertinent part:

> When wearing by persons not on active duty authorized.
>
> * * * * * * *
>
> (f) While portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may

wear the uniform of that armed force if the portrayal does not tend to discredit that armed force.[1]

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner and Jarrett Vandon Smith, Jr., were convicted of the unauthorized wearing of distinctive parts of an Armed Forces uniform, in violation of 18 U.S.C. 702. On February 29, 1968, petitioner was sentenced to imprisonment for six months and fined $250. The court of appeals affirmed both convictions.[2]

On December 4, 1967, approximately nineteen persons gathered outside the Armed Forces Induction Center at Houston, Texas, to protest American participation in the Vietnam war. Some of the demonstrators marched up and down with anti-war placards; others passed out leaflets (A. 19–20, 30). During the course of this demonstration, which lasted from 6:30 to 8:30 a.m., petitioner and co-defendant Smith were observed wearing distinctive parts of the uniform of the United States Army (A. 12–15). Petitioner wore a blouse of the type currently authorized and issued to Army enlisted men, bearing a shoulder patch designating service in Europe. The buttons on his blouse were of a distinctive military design. On his head petitioner wore an outmoded military hat. Affixed to the hat in an inverted position was the eagle insignia currently worn on the hats of Army officers

[1] See 14 U.S.C. 486 making this exception applicable to Coast Guard uniforms.

[2] Smith did not file a petition for a writ of certiorari.

(A. 20–23, 26–28). Smith was wearing an Army blouse with official military buttons attached (A. 13–15; R. 102–103). Neither petitioner nor Smith were members of the Armed Forces at the time they wore these items.[3]

During the demonstration Smith distributed leaflets while petitioner and another individual dressed in military-colored coveralls pursued a third person dressed as a woman in a black robe and a coolie-type hat. The pursuers carried water pistols filled with red ink. One would say "Be an able American" and they would shoot their water pistols at the third person, who would fall to the pavement. They would then kick the cape aside and say "My God, this is a pregnant woman" (A. 30). A newspaper reporter covering the demonstration testified that the skit was performed three or four times, each performance lasting no longer than three minutes (A. 32).[4] Government witnesses who had seen petitioner at the demonstration declined to characterize his conduct as a role in a play; they testified that in the course of the demonstration petitioner and the other individuals merely chased each other in a manner resembling horseplay rather than acting (A. 16, 18, 24).

The individual who was dressed as the black robed woman testified that he was portraying a Viet Cong in order to show some of the "more inhuman as-

[3] Petitioner had never been in the military service; Smith had been honorably discharged from the United States Army (R. 193).

[4] The jury was shown a movie of the skit (R. 350–353).

pect" that American soldiers carry toward the Vietnamese and that it was his purpose to discredit the actions of the Army (A. 34, 37–38). He said that part of the skit was "rehearsed" the day before in front of a student club at the University of Houston in order to get student opinion (A. 34–35, 37). Testifying in his own defense, petitioner explained that he wore parts of the military uniform to express his beliefs about Vietnam (A. 42) and that the skit was part of a nationally coordinated demonstration (A. 40).

The trial court instructed the jury as to the various statutes and regulations which authorized a person to wear a military uniform (A. 47). The court told the jury that petitioner claimed that he was authorized to wear the uniform under the exception provided in 10 U.S.C. 772(f). It read the language of this provision and defined the words "portrayal," "theatrical," and "discredit" (A. 50–53). The jury was told that it must acquit petitioner if it found that he wore parts of the military uniform while performing in a theatrical production if he did so in a manner which did not tend to discredit the Armed Forces (A. 53–55).

ARGUMENT

Summary and Introduction

I

We discuss in Part I, *infra,* a substantial question as to the jurisdiction of this Court to entertain the petition for a writ of certiorari in this case, which

was filed 101 days after the time specified in Rule 22(2) of the Court's Rules had expired. The Court has consistently held that time limitations prescribed by statute are jurisdictional and that an untimely application, in a case governed by statute, does not confer jurisdiction on the Court. Although the Court has indicated that it does not regard the time limits specified by its Rules as having jurisdictional effect, that position is inconsistent with clearly articulated congressional policy and raises a constitutional problem.

The statutory authority under which the Court promulgated Rule 22(2) was enacted by Congress to enable the Court to *expedite* the disposition of criminal cases. There is no indication that Congress intended to authorize the Court to disregard the 30-day rule which the Court adopted to fix the time for invoking its jurisdiction, and it plainly distorts the intent of Congress to entertain petitions, like the one here, filed after the expiration of the maximum time which Congress has authorized for petitioning in *any* type of case. In addition, the importance of strict adherence to time limitations in effectuating the policy of finality of litigation, particularly significant in criminal cases, refutes the suggestion that Rule 22(2) may be disregarded merely because it is a rule and not a statute, and supports our submission that the Rule specifies a jurisdictional limitation which was not satisfied in this case.

II

There is sharp disagreement between petitioner and the government as to how the issues in this case

should be framed and considered. The petitioner was prosecuted under a statute, 18 U.S.C. 702, which states a general prohibition against the wearing "in any place" of the "uniform or a distinctive part thereof" of any of the armed forces without authority to do so. It was proved at trial that petitioner, a civilian, did wear distinctive parts of the uniform of the United States Army. He claimed, however, that his use of the uniform was exempted from the reach of 18 U.S.C. 702 under another statute, 10 U.S.C. 772(f), which permits "an actor in a theatrical or motion-picture production" to wear the uniform while portraying a member of one of the armed services "if the portrayal does not tend to discredit" the service. This statutory defense, together with its limitation, was submitted to the jury by the trial court, and the petitioner was convicted. By a process of reasoning which does not seem to have been fully articulated in his brief, petitioner concludes that he was convicted of performing in a skit which tended to discredit the Army and that such a conviction violates his First Amendment rights. This theory of the case is inaccurate and obscures the path to resolution of the issues presented.

The petitioner was not convicted of discrediting the Army or participating in a skit which discredited the Army. He was convicted, on the basis of substantial evidence, of the unauthorized wearing of distinctive parts of the Army uniform, by a jury that was properly instructed on all elements of the offense. If Congress, consistently with the First Amendment, may prohibit the unauthorized wearing of the uniform

in the circumstances of this case, and if petitioner was not authorized to wear the uniform, his conviction must be affirmed.

We show in Part II, *infra,* that the government has a legitimate and substantial interest in prohibiting unauthorized persons from wearing the military uniform. The risks of misrepresentation and confusion of the public and of governmental officials which support the general prohibition against unauthorized wearing of the uniform justify the conviction of petitioner, who wore distinctive parts of the Army uniform in a demonstration at an Armed Forces Induction Station, where spectators would be likely to conclude that those who were wearing the uniform were in fact members of the Armed Forces. Petitioner gained no First Amendment immunity from the operation of the statute on the ground that he was engaging in an anti-war demonstration. A civilian has no First Amendment right to wear the uniform of the Armed Forces—to pretend to be what he is not—merely because it is thought to make the communication of ideas more effective.

The statute permitting actors "in a theatrical * * * production" to wear the uniform did not authorize petitioner to wear the Army uniform in the circumstances of this case. As we discuss in Part III, *infra,* the statutory language and legislative history of that exemption, as well as the purposes of the general prohibition against unauthorized wearing of the uniform, establish that the exemption is available only for performances given in a setting where there is a specific area set aside for the actors and in circumstances

where all observers are apprised that the person wearing the military uniform is not in fact a member of the Armed Forces. Petitioner's skit, which was an intermittent event in a street demonstration consisting of picketing and distribution of leaflets, was beyond the scope of the exemption for "theatrical * * * productions" as a matter of law. Since petitioner therefore was not entitled to any instruction concerning this exemption, he was not prejudiced by any error which may have been committed in instructing the jury that he could be acquitted under the exemption if his performance did not tend to discredit the Army. To the extent that that qualification is invalid, its only effect was to limit a defense to which petitioner was not entitled, see Part IV, *infra*.

I. QUESTION CONCERNING JURISDICTION

The extreme untimeliness of the petition for a writ of certiorari in this case presents a substantial question as to this Court's jurisdiction to review the judgment of the court of appeals. Although the petition was accompanied by a motion for leave to file out of time, which the Court granted (A. 72), we believe it is proper to raise and discuss this jurisdictional issue, which was not fully treated at the petition stage of the case. The disposition of untimely petitions for writs of certiorari in criminal cases is a recurrent problem, on which the Court's pronouncements are in conflict. This case presents an appropriate occasion for the Court to focus on this question and to reexamine some determinations which may

have been made without awareness of decisions which should have been controlling.

Rule 22(2) of the Rules of this Court provides that a petition for a writ of certiorari to review the judgment of a federal court of appeals in a criminal case shall be deemed in time when the petition and record are filed within 30 days after the entry of the judgment. The petition in this case was filed 131 days after the judgment of the court of appeals; no extension of time for filing a petition was requested or obtained. The petition was, therefore, 101 days out of time. Even if the maximum extension of time authorized by Rule 22(2)—30 days—had been granted by a Justice of this Court "for good cause shown", the petition would have been 71 days late. Indeed, the petition was 41 days out of time measured by the longest period allowed by statute or rule—90 days—for petitioning for a writ of certiorari or taking an appeal, without extension, in any case. 28 U.S.C. 2101(a)–(d), Rule 22(1). For reasons which follow, we submit that, because of its substantial untimeliness, the petition did not confer jurisdiction on the Court.

Untimeliness as a jurisdictional bar to review by this Court.

It is a well-established principle that statutes prescribing the *classes* of cases which may be reviewed by this Court are to be strictly construed to prevent the enlargement of the Court's appellate jurisdiction beyond the scope which Congress has authorized. See, *e.g., Phillips* v. *United States*, 312 U.S. 246; *Goldstein* v. *Cox*, No. 66, this Term, decided January 26, 1970. Thus, where a direct appeal is taken to this Court

from the decision of a three-judge district court pursuant to 28 U.S.C. 1253, the statutory condition that the case must be one that is "required" by statute to be heard by a three-judge court is a limitation on this Court's jurisdiction, which cannot be disregarded merely because the case was in fact heard by three judges. See *Flast* v. *Cohen,* 392 U.S. 83, 88–91.

Although the time limit within which review by this Court must be sought has not, to our knowledge, been specified in the very provisions which delimit the classes of cases that are reviewable, the Court has consistently held that where Congress has specified such limits by statute, an application made after the time limit has expired does not confer jurisdiction on the Court. See, *e.g., Department of Banking* v. *Pink,* 317 U.S. 264; *Citizens Bank* v. *Opperman,* 249 U.S. 448. These holdings demonstrate respect not only for the constitutional command that this Court shall exercise appellate jurisdiction "under such Regulations as the Congress shall make" (Art. III, Sec. 2; cf. *Ex parte McCardle,* 7 Wall. 506); but also for the important policies which demand strict adherence to time limitations on appellate review. This was made explicit in *Matton Steamboat Co.* v. *Murphy,* 319 U.S. 412, 415, where the Court stated, in holding that it was "without jurisdiction" to entertain an untimely appeal, "[t]he purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would

defeat its purpose." Similarly, in *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, where the Court dismissed the writ of certiorari on the ground that the petition had been filed out of time, the Court said, "the principle that litigation must at some definite point be brought to an end * * * is * * * reflected in the statutes *which limit our appellate jurisdiction* to those cases where review is sought within a prescribed period" (*id.* at 213; emphasis added).[5]

Where the Congress has delegated to the courts the authority to specify by rule the time within which appellate review must be sought, the rule which the court prescribes is a piece of delegated legislation; it is of no less fundamental character as a regulation on the exercise of appellate jurisdiction than a statutory provision. The fact that the time limitation is fixed by judicial rule rather than statute does not empower the courts to disregard the rule to reach a desired result in individual cases. Thus, the Court held in *United States* v. *Robinson*, 361 U.S. 220, that under the Federal Rules of Criminal Procedure which provided for a 10-day period, without enlargement, for the filing of a notice of appeal to the court of appeals, the district court was not permitted to accept an untimely filing on the ground of "excusable neglect" and that such a filing did not confer jurisdiction on the court of appeals. There the Court said (361 U.S. at 229):

> That powerful policy arguments may be made both for and against greater flexibility

[5] It is noteworthy that the decisions in *Matton Steamboat Co.*, and *Minneapolis Honeywell* were rendered after briefing and argument, requested by the Court, on the timeliness question.

> with respect to the time for the taking of an appeal is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision.

See, also, *Berman* v. *United States,* 378 U.S. 530, reaffirming the holding of *Robinson.*

No different result is suggested by the fact that the time within which a petition for certiorari must be filed in criminal cases is specified by the Rules of this Court and not included in the system-wide Rules of Criminal Procedure. Fidelity to the time limits prescribed in the Court's own Rule is no less important to the litigants, and no less significant to effectuation of the policy of finality of litigation, than adherence to the limits specified by statute or the Rules of Criminal Procedure. Constitutional considerations are also present, for it is fair to characterize the time limits prescribed by this Court pursuant to congressional authorization as specifying the period, congenial to the Court's institutional considerations, which Congress intended to be the jurisdictional limitation on the Court's power to review criminal judgments by certiorari. In the absence of any evidence to the contrary, it is a reasonable premise that Congress, in authorizing the Court to fix time limits, contemplated that such limits would be observed as jurisdictional and would not be subject to discretionary waiver by the Court which was not permissible with respect to limits fixed by statute. Indeed, this is just what the Court held in *United States ex rel. Coy* v. *United*

States, 316 U.S. 342, which we discuss in the following section.

While it is true that the Court has indicated that some time limitations are not jurisdictional, we do not believe that our submission here is foreclosed. Nothing in the Court's decision in *United Public Workers* v. *Mitchell*, 330 U.S. 75, 84–86, is contrary to our position. There the Court held that the 60 day period for docketing an appeal "under such rules as may be prescribed by the proper courts", under the predecessor of 28 U.S.C. 2101(a), was not a jurisdictional limitation, and that an appeal which had been timely filed was not subject to automatic dismissal because the record was docketed late, where the appellee had failed to move to dismiss the appeal, as required by the Court's rule, prior to docketing. Since the case involved an appeal which had been timely filed, the policy of finality of litigation and fairness to the parties was fully served because the Court's jurisdiction was seasonably invoked, and the appellee had an adequate remedy under the rule to prevent prejudicial delay in bringing the case to adjudication. We also recognize that, in recent years, the Court has occasionally granted certiorari and ruled on the merits in criminal cases in which the petition was filed out of time. See Stern & Gressman, *Supreme Court Practice*, 242–245 (4th ed. 1969). In many instances this has been done without express recognition of the timeliness question in the Court's opinion, and in the cases where the Court has noticed the untimeliness of the petition and dismissed the defect as "not jurisdictional" it has not had the ad-

vantage of a full submission by the parties. Thus, in *Heflin* v. *United States*, 358 U.S. 415, which is frequently cited as the authority for the proposition that Rule 22(2) is not jurisdictional, the government did not argue that the untimeliness of the petition deprived the Court of jurisdiction, and the Court disposed of the issue in the following language, relegated to a footnote, without any citation to precedent (*id.* at 418 n. 7):

> * * * Nevertheless, because successive motions may be made under Rule 35 [F.R.Crim.P.] and because no jurisdictional statute is involved, the majority agrees to dispense with the requirements of our Rule [22(2)] in order to avoid wasteful circuity.[6] * * *

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[6] The petitioner in *Heflin* sought to challenge, in a postconviction proceeding, the legality of a sentence which he had not begun to serve. The government argued, and a majority of the Court held, that petitioner's claim was not cognizable under 28 U.S.C. 2255. The government acknowledged, however, that petitioner could raise the claim under Rule 35, F.R.Crim.P. After noting that if the case should be treated as arising under Rule 35, the petition was "out of time under Rule 22(2)", the government's brief went on to state: "We recognize, however, that if petitioner should properly prevail under Rule 35, the same issue could be raised by a new motion under that rule, and to that extent the question is not academic at this time" (Brief for the United States, No. 137, O.T. 1958, p. 12). The brief then discussed the merits of petitioner's claim, which a majority of the Court reached under the Rule 35 theory, and which the Court unanimously resolved in petitioner's favor. The government's comment on the timeliness question, which was phrased in terms of the Court's *discretion*, sheds light on the Court's statement quoted in the text and shows that the government's submission did not put in issue the problem of the Court's *jurisdiction* which has become evident on further research. See also *Taglianetti* v. *United States*, No. 446, O.T. 1968, in which the government's brief in opposition stated (p. 3)

The origin of the 30-day rule for petitioning for certiorari in federal criminal cases.

The statutory authority for Rule 22(2) is found in the acts of February 24, 1933, 47 Stat. 904, and March 8, 1934, 48 Stat. 399—now 18 U.S.C. 3772—which authorize the Supreme Court to prescribe rules of practice and procedure with respect to proceedings after verdict in criminal cases, including "rules prescribing the times for and manner of taking appeals and applying for writs of certiorari * * *". In the initial rules promulgated under this authority, effective September 1, 1934, a 30-day period was specified for the filing of petitions for writs of certiorari. 292 U.S. 660, 665–666.

At the time these statutes were enacted, a provision of the Judiciary Act of February 13, 1925, specified a general limitations period for all cases in the Supreme Court on appeal or certiorari. It provided that "No appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * *" (43

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that the petition was 11 days "out of time under this Court's Rule 22(2) and for that reason should be denied", and went on to discuss the merits of the petitioner's contentions. The Court granted the petition and affirmed the judgment in a *per curiam* opinion dealing with a question of electronic surveillance; the Court dealt with the timeliness question in the following footnote (394 U.S. 316 n. 1):

> Although this petition for certiorari was not filed within the 30 days allowed by the Court's Rule 22(2), the time limitation is not jurisdictional, *Heflin* v. *United States*, 358 U.S. 415, 418, n. 7 (1959), and does not bar our exercise of discretion to consider this case.

Stat. 940, 28 U.S.C. (1940 ed.) 350). The purpose of the legislation authorizing the Court to promulgate rules for criminal cases, including the time for petitioning for certiorari, was specifically to "expedite" the handling of criminal appeals. H. Rep. No. 2047, 72d Cong., 2d Sess., p. 2; S. Rep. No. 257, 73d Cong., 2d Sess.; H. Rep. No. 858, 73d Cong., 2d Sess.; *United States* v. *Robinson, supra,* 361 U.S. at 226. And the 30-day time limitation on petitions for certiorari was adopted to further this goal. *United States ex rel. Coy* v. *United States, supra,* 316 U.S. at 345.

In the first case to reach the Court on the question of the effect of the 30-day rule, *United States ex rel. Coy* v. *United States,* in which the issue was fully litigated, the Court rejected the petitioner's claim that the petition, which was filed more than 30 days after the judgment of the court of appeals, was in time under the general 3-month time limitation statute. The Court unanimously held that, in light of the purpose of expediting criminal proceedings, the Criminal Rules applied to all criminal proceedings in the Supreme Court, notwithstanding the Rules' inadvertent failure to cover that particular case in the court of appeals, and that where a petition is "filed too late [under the Rules] we are without jurisdiction" (316 U.S. at 344). The Court subsequently cited the *Coy* decision in orders denying certiorari in criminal cases on the ground that the petition was untimely. *E.g., Roscoe* v. *United States,* 325 U.S. 890; *Buie* v. *United States,* 317 U.S. 689.

Apart from the specific authority of the *Coy* decision, which is most likely to reflect the contempo-

raneous understanding of the jurisdictional effect of the 30-day rule, the origin of the rule itself suggests a persuasive reason for concluding that the petition in the present case is beyond the Court's jurisdiction. In authorizing the Court to specify the time limit for certiorari petitions by rule, Congress intended to empower the Court to expedite the disposition of criminal cases, which theretofore were covered by the general 3-month limitation. Even if it is assumed that the legislation did not require the Court to treat any shorter period adopted by rule as a strict jurisdictional bar, it is unmistakably clear that Congress did not intend to authorize the Court to allow a longer period in criminal cases than in all other cases. Thus, if for some reason the Court had specified in its rule the same three month period provided in the general statute, it would stand the enabling legislation on its head to argue that the Court could waive its rule and grant untimely petitions in criminal cases merely because the time limit was set by rule and not by statute. Yet that would be precisely the result of the Court's entertaining the petition here, which was filed more than 40 days after the longest period allowed by Congress for petitioning in any case.[7]

The policy of finality of litigation in criminal cases.

In addition to the constitutional and statutory considerations developed above, the importance of finality of litigation in the administration of criminal justice lends further support to the principle that the time limitation specified by rule in criminal cases

[7] Although the Judicial Code, as revised in 1948, presently contains no 90-day provision generally applicable to all cases on certiorari, we find nothing to indicate that the revision was intended to allow a longer period in criminal cases. On the contrary, the Revisers Note following 28 U.S.C. 2101 states that the words "in

should be treated as jurisdictional. The sense of certainty which results from a final criminal judgment is critical to the accomplishment of the purposes of enforcement of the criminal law. It assures the general public and potential offenders that the system can impose its prescribed sanctions speedily and fairly, and it signifies to the convicted defendant himself that he must submit to the correctional and rehabilitational process which society has devised for the avoidance of future offenses. In the absence of time limitations on the exercise of appellate remedies, and without a willingness by the courts to observe those limitations, this certainty cannot be achieved.

It is true that our system of justice affords a generous collateral remedy for the correction of fundamental errors after direct appellate review has been exhausted, so that a sentence of imprisonment is never conclusively "final" against challenge on constitutional grounds. But the availability of this remedy, by assuring that constitutional defects will not go uncorrected, argues for, not against, the principle that time limitations on direct review should be enforced. *Robinson* v. *United States, supra,* 361 U.S. at 230 n. 14. It is important both to the preservation of the symbolic effect of criminal judgments and to the administration of already overburdened prosecutorial agencies that there be a definite point in time after

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a civil action * * *" were added to Section 2101(c), the present statement of the 90-day rule, "because section 350 of title 28 U.S.C., 1940 ed. [the general 3-month limitation period] was superseded as to criminal cases by Federal Rules of Criminal Procedure, rule 39 [sic] (a)(2), (b)(2)." This comment undoubtedly refers to Rule 37, which, in subsection (b)(2), specified a 30-day limitation period for petitions for certiorari, as did its predecessor, Rule XI of the 1934 Rules in Criminal Cases. See 327 U.S. 821, 825, 857–858, 859–860; 292 U.S. 661, 665–666.

which a conviction cannot be challenged for errors which are not of a fundamental character. And to the extent that this Court's rules for the retroactive effect of new constitutional decisions turn upon whether a conviction has become 'final", strict observance of the time limitations for invoking direct appellate review is necessary to ensure that such rules operate fairly with respect to all defendants similarly situated.

It may be objected that strict enforcement of time limitations produces unfairness where delay is caused by ignorance of rights or some other compelling circumstances. Cf. *Teague* v. *Regional Commissioners of Customs*, 394 U.S. 977 (Black, J., dissenting from the denial of certiorari). But such "unfairness", which is always a subjective determination, is inherent in any rule which prescribes the time within which an act must be done. Where the rule involves a fundamental step in the administration of justice—such as a statute of limitations or the time for invoking an appellate court's jurisdiction—the potential for unfairness does not outweigh the evil which would result from a policy of disregarding the rule to exercise jurisdiction long after the time has expired. The problem illustrated by the present case—in which the petition was filed after the expiration of any possible limitation period which could have been borrowed to fix an outer limit on the exercise of discretion to allow untimely filings for "excusable neglect"—is that there is no rule of law to prevent the Court from entertaining an untimely petition even years after the entry of judgment below. As the Court

said in *Robinson* v. *United States, supra,* 360 U.S. at 230:

> * * * If, by that process, the courts are ever given power to extend the time for the filing of a notice of appeal upon a finding of excusable neglect, it seems reasonable to think that some definite limitation upon the time within which they might do so would be prescribed; for otherwise, as under the decision of the court below, many appeals might—almost surely would—be indefinitely delayed. Certainly that possibility would unnecessarily produce intolerable uncertainty and confusion. * * *

The Court responded to this problem in Rule 4(b) of the Rules of Appellate Procedure, which provides that "[u]pon a showing of excusable neglect, the district court may, before or after the time has expired, * * * extend the time for filing a notice of appeal [to the court of appeals] for a period *not to exceed 30 days from the expiration of the* [10-day period] *otherwise provided* * * * (emphasis added). In the absence of such a provision in the rule governing the time for petitioning for certiorari, however, we believe that the rule should not be treated as subject to discretionary waiver, without limitation, and, accordingly, that the untimeliness of the petition is a jurisdictional bar to this Court's review.

II. PETITIONER'S FIRST AMENDMENT RIGHTS WERE NOT VIOLATED BY HIS CONVICTION FOR THE UNAUTHORIZED WEARING OF DISTINCTIVE PARTS OF THE MILITARY UNIFORM

The essence of petitioner's First Amendment contention, as we understand it, is that he was convicted for engaging in conduct to which the prohibition

against unauthorized wearing of the military uniform could not constitutionally be applied. This is in effect the conclusion which he draws from his assertion that there is no sufficient governmental interest underlying 18 U.S.C. 702, as well as the premise for his challenge to the limitation on the exemption contained in 10 U.S.C. 772(f). To the extent that he argues that he was not afforded a constitutionally adequate defense under 10 U.S.C. 772(f), the persuasiveness of that argument as a basis for reversal rests on petitioner's largely unstated assumptions as to what defenses were constitutionally required in the circumstances of this case—matters we defer to subsequent sections of the brief.

We begin with petitioner's fundamental position that his wearing of distinctive parts of the military uniform in the circumstances of this case was protected by the First Amendment against the operation of 18 U.S.C. 702. Petitioner's primary submission rests upon two contentions: (1) that there is no sufficient governmental interest underlying 18 U.S.C. 702 to justify its application to persons who choose to wear distinctive parts of the military uniform while exercising First Amendment rights of speech and assembly; and (2) that even if there is some such governmental interest, it does not justify the conviction of petitioner since he was acting in a "play". Neither contention, in our view, can be sustained.

A. THE PROHIBITION AGAINST UNAUTHORIZED WEARING OF THE UNIFORM IS SUPPORTED BY SUBSTANTIAL GOVERNMENTAL INTERESTS UNRELATED TO THE REGULATION OF SPEECH

The authority of Congress to regulate the wearing of the military uniform rests upon its broad constitu-

tional power to raise and support armies and to make all laws necessary and proper to that end. *United States* v. *O'Brien*, 391 U.S. 367, 377. A military uniform, like a police uniform, is necessary for the function that the military performs. To other military personnel, the uniform identifies the wearer's branch of service, rank, and specialty, and indicates both his scope of authority over subordinates and the extent to which he is subject to the command of a superior officer. To civilians, the uniform announces the wearer's military authority and the fact that he is under military discipline. See *Board of Education* v. *Barnette*, 319 U.S. 624, 632. It signifies the wearer's authority to be present at defense installations, to have possession of government property, including weapons, and to command and keep the peace in times of emergency, such as a local civil disturbance or natural disaster. On occasions when a member of the Armed Forces is on leave from military duties, the uniform may be significant for disciplinary and other purposes, see *O'Callahan* v. *Parker*, 395 U.S. 258; it may make it possible, for example, for the military to control its personnel and thus relieve a burden on civilian authorities. Finally, as a symbol of shared experiences in the service and fidelity to its standards of conduct, the uniform plays an intangible but important role in morale and esprit de corps for the military services.

The significance which both military personnel and civilians regularly attach to the wearing of a military uniform sufficiently demonstrates the govern-

ment's substantial interest in preserving the integrity of the uniform by restricting its use to authorized persons. Civilians undoubtedly believe, at this time, that persons who publicly wear the military uniform or distinctive parts thereof are, in fact, members of the Armed Forces and subject to military discipline. Allowing unauthorized persons to wear the uniform would create a risk that unsuspecting civilians might be defrauded or physically injured as a result of relying on the authority of an impostor's uniform. But the problem extends beyond criminal conduct; there is also a risk of confusion respecting activities which the public might conclude are officially sanctioned by reason of the participation of persons wearing military uniforms without authority to do so, as well as other types of conduct which some persons might find objectionable and seek to hold the military service responsible. Carried to its foreseeable result, the unauthorized wearing of the military uniform or its distinctive parts could cause a reversal of the existing presumption of the authority of a person wearing the uniform and create widespread public distrust.

These considerations justify a much more comprehensive regulation of the wearing of the military uniform than would be constitutionally permissible with respect to other items of dress in which the government has no special interest. Compare *Tinker* v. *Des Moines School District,* 393 U.S. 503. The instant statute is responsive to what Mr. Justice Harlan has called the government's "vital interest * * * in preserving the reputation, morale, and integrity of the military service." *O'Callahan* v. *Parker,* 395 U.S. 258, 281

(dissenting opinion). And, as this Court said with respect to a complementary statute specifically directed against impersonation of government officers and employees, one of the purposes of such a statute is "to maintain the general good repute and dignity of the service itself." *United States* v. *Barnow*, 239 U.S. 74, 80; *United States* v. *Lepowitch*, 318 U.S. 702, 704; *United States* v. *Wight*, 176 F. 2d 376, 379 (C.A. 2). Senator Thomas of Colorado, who introduced the original version of the instant statute as an amendment to the National Defense Act of 1916, stated that his amendment[8] was "designed to protect the dignity of the American uniform and to punish discrimination against it." 53 Cong. Rec. 6347; see *id.* at 8404.

Since the prohibition against the wearing of the uniform by unauthorized persons effectuates legitimate governmental interests, petitioner, a civilian, gained no right to wear that uniform on the street because he did so for the purpose of protesting the war in Vietnam. It is no necessary incident of the freedom of speech that a civilian demonstrator have the right to impersonate a soldier by wearing distinctive parts of the military uniform. Any doubt on this score should have been laid to rest by *United States* v. *O'Brien*, 391 U.S. 367, in which this Court upheld a statute making it a crime to destroy a Selective Serv-

[8] The amendment introduced by Senator Thomas initially included a provision, not included in the final version, making it an offense for a common carrier or a hotel or theater to discriminate against a military officer or enlisted man. Senator Thomas noted that a statute forbidding such discrimination (now 18 U.S.C. 244) was limited to the District of Columbia, Alaska and territories.

ice registration certificate. As the Court said (391 U.S. at 376):

> * * * However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms; compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. * * *

Under this test, the substantial governmental interest which we have detailed above justifies whatever incidental limitations on the communication of ideas may result from the prohibition which Congress has enacted. In sum, the restriction on the use of the uniform, like the protection of the Selective Service certificate "furthers the smooth and proper functioning

of the system that Congress has established to raise armies" *United States* v. *O'Brien*, 391 U.S. at 381.

B. THESE GOVERNMENTAL INTERESTS SUPPORT PETITIONER'S CONVICTION UNDER 18 U.S.C. 702 ON THE FACTS OF THIS CASE

The fact that Congress exempted "actor[s] in a theatrical or motion-picture production" (10 U.S.C. 772(f)) from the prohibition against unauthorized wearing of the uniform does not, as petitioner argues, demonstrate a "recognition that the governmental interest * * * is not substantial or compelling * * *" (Br. 6). Nor does it suggest that the governmental interests underlying 18 U.S.C. 702 are attenuated in the circumstances of this case. On the contrary, this limited exemption—which we consider, on the issue of statutory construction, in the following section—is fully consistent with the significant governmental interests described above.

The circumstances which, in our view, are contemplated by that exemption include, at the least, a performance which is given in a manner and setting which is calculated to give notice to all spectators that they are witnessing something that is "staged" rather than real. Such circumstances, by definition, negate the risks of misrepresentation and confusion of the public and of governmental officials which the prohibition against unauthorized wearing of the uniform was designed to prevent. We need not consider whether the statutory exemption for such performances is constitutionally required, or the extent to which such performances would be constitutionally protected in the absence of the exemption, because

the circumstances in which petitioner wore distinctive parts of the military uniform were not calculated to give notice to spectators that he was not in fact a member of the Armed Forces. Indeed, the location which petitioner and his colleagues chose for their demonstration—an Armed Forces induction station—is a setting which strongly suggested to spectators that those who were wearing distinctive parts of the Army uniform were members of the Armed Forces.

Nor is there merit in any suggestion that petitioner's conduct may have been constitutionally immune from punishment, irrespective of the scope of the statutory exemption, because he was performing in a "play" protected by the First Amendment. This case does not call for resolution of broad questions of the scope of the First Amendment protection for theatre productions, or whether, and the extent to which, the First Amendment limits governmental regulation when actors take to the streets to present their play-message to a largely unconsenting public. The only question here is the regulation of *conduct,* the wearing of distinctive parts of the military uniform, under a statute which reaches only that conduct and does not censor the content of individual speech or control the places where it may be given. The objectives of the statute, as Judge Goldberg said in his concurring opinion below, "require that the patriot no less than the revolutionary, the bystander no less than the protester, forego the unauthorized wearing of the uniform" (A. 70). There are many other activities, including more direct exercises of the freedom of speech than petitioner's performance, in which the wearing of a military uniform may

be thought to make the communication of ideas more effective. Yet it hardly can be contended that a civilian intending a speech about military misconduct, or the need for greater military expenditures, for example, is entitled, under the First Amendment, to wear the uniform in delivering the speech notwithstanding the prohibition in 18 U.S.C. 702. Similarly, petitioner's performance—which, like the foregoing example, may have gained in effectiveness by a misrepresentation of military status and which was carried out in a place where that misrepresentation was very likely to be successful—was not "protected" by the First Amendment against the operation of this general federal statute.

III. PETITIONER DOES NOT COME WITHIN THE EXEMPTION CONTAINED IN 10 U.S.C. 772(f) FOR THE WEARING OF A MILITARY UNIFORM BY AN ACTOR IN A THEATRICAL PRODUCTION

Under 10 U.S.C. 772(f) a civilian "actor in a theatrical or motion picture production" is authorized to wear the military uniform "[w]hile portraying a member of the Army, Navy, Air Force, or Marine Corps" and is thus exempt from the prohibition of 18 U.S.C. 702 to which he would otherwise be subject. Although petitioner devotes a major portion of his argument to establishing the unconstitutionality of a subsequent limitation on that exemption—"if the portrayal does not tend to discredit that armed force" (see Part IV, *infra*)—nowhere in his brief does he consider the threshold question whether he comes within the exemption in any event as an "actor in a

theatrical production." We view this question as the heart of the case. If the prohibition of 18 U.S.C. 702 may constitutionally be applied to petitioner's wearing of distinctive parts of the Army uniform, as we argue in Part II, *supra,* he must establish, in order to secure reversal of his conviction, that he was at least entitled to a jury instruction encompassing the exemption in 10 U.S.C. 772(f). If he was not entitled to such an instruction, then, as we argue in Part IV, *infra,* any error which the court may have made in submitting the exemption to the jury together with the challenged limitation affords no basis for reversal. We conclude, for the following reasons, that petitioner's conduct did not come within the statutory exemption, as a matter of law, and therefore that he was not entitled to an instruction submitting that defense to the jury.

A. THE STATUTORY EXEMPTION IS LIMITED TO PERFORMANCES BY ACTORS IN PLAYHOUSES, THEATERS, AND OTHER SETTINGS IN WHICH THE ROLE OF THE PERFORMERS AS ACTORS IS CLEARLY APPARENT FROM THE CIRCUMSTANCES

1. The language, history, and purpose of the exemption for "an actor in a theatrical production" show that the exemption is applicable only to performances in playhouses, theaters, or equivalent settings, where there can be no likelihood of misunderstanding by any spectator that the person wearing the uniform is not in fact a soldier. It was not intended, to paraphrase Shakespeare, to make a stage of the world and an actor of anyone who chooses to wear a military uniform.

The source of both the prohibition found in 18 U.S.C. 702 and the exemption found in 10 U.S.C. 772(f) is Section 125 of the National Defense Act of June 3, 1916 (39 Stat. 166, 216–217), which read in pertinent part:

> It shall be unlawful for any person not an officer or enlisted man of the United States Army, Navy, or Marine Corps, to wear the duly prescribed uniform of the United States Army, Navy, or Marine Corps, or any distinctive part of such uniform, or a uniform any part of which is similar to a distinctive part of the duly prescribed uniform of the United States Army, Navy or Marine Corps: *Provided,* That the foregoing provision shall not be construed * * * to prevent any person from wearing the uniform of the United States Army, Navy, or Marine Corps in any playhouse or theater or in moving-picture films while actually engaged in representing therein a military or naval character not tending to bring discredit or reproach upon the United States Army, Navy, or Marine Corps * * *.[9]

This original exemption was thus limited by its terms to the wearing of a military uniform "in any playhouse or theater or in moving-picture films." Consistently with the policies noted above, the exemption was applicable only to performances in places

[9] Other exemptions enacted at that time and carried forward in 10 U.S.C. 772, permit the uniform to be worn, *inter alia*, by former officers upon occasions of ceremony; by discharged servicemen for a limited period following discharge; and by civilians taking a course of military instruction given by military authorities. See also Army Regulation No. 670–5, Chap. 3 (September 23, 1966).

where the audience would be unequivocally aware that the individuals portraying military figures were merely actors in the world of make-believe.

In 1956, Titles 10 and 32 of the United States Code underwent a complete revision for the purpose of combining the laws affecting the Armed Forces, eliminating duplicate and obsolete provisions, and clarifying statutory language.[10] At that time the phrase "actor in a theatrical or motion-picture production" was substituted for the phrase "in any playhouse or theater or in moving-picture films while actually engaged in representing therein a military * * * character," and the exemption was codified in 10 U.S.C. 772(f). The sponsors emphasized, however, that no substantive change had been intended by the revision.[11] The sole purpose of the restatement was to remove the negative character of the authorization and thus "to make positive the authority of the persons described * * * to wear the uniform prescribed for the appropriate organization or activity." H. Rep. 970, 84th Cong., 1st Sess., pp. 52–53; S. Rep. 2484, 84th Cong., 2d Sess., pp. 63, 64.

The 1956 revision, eliminating "in any playhouse" and substituting "theatrical or motion-picture produc-

[10] In the 1948 revision of the Criminal Code, the penalty provision (now 18 U.S.C. 702) was placed in Title 18. Prior to 1956, the remainder of the provision, then entitled "Protection of the uniform," was codified in 10 U.S.C. (1952 ed.) 1393.

[11] See the testimony of Dr. F. Reed Dickerson, Office of the General Counsel of the Department of Defense, Hearings before a Subcommittee of the Senate Committee on the Judiciary on H.R. 7049, 84th Cong., 2d Sess., pp. 15–16; Statements of Senators O'Mahoney and Wiley, 102 Cong. Rec. 13944, 13953 (July 23, 1956); and H. Rep. No. 970, 84th Cong., 1st Sess., p. 8.

tion," is not without significance. The change in language settled that a formal playhouse is not a prerequisite for the lawful wearing of the uniform by civilian actors, and it clarified the status of television performances, which placed strain on the language "in any playhouse." But we can find no basis for concluding that the new term "theatrical * * * production" should be interpreted as a departure from the intent of Congress, manifest in the original language, to confine the exemption to situations where the make-believe role of the person wearing the uniform is clear from the setting. The language itself suggests no such departure. A "theatrical * * * production" plainly requires more than mere "theatrics". Fairly read in light of the provision's history, it connotes the giving of performances in a setting equivalent to a playhouse or theater where even a casual observer would be aware that he was witnessing a make-believe performance and that the person in uniform was an actor and not a serviceman presently on active duty with the armed forces. This does not mean that the performance must be given in a building regularly devoted to the presentation of entertainment, or even that it must be given in a building at all. It means only that the performance, wherever given, must preserve some of the traditional characteristics of dramatic presentations, such as a defined area set aside for the actors and an audience apprised that the events which they observe are portrayed, not real. We need not delimit these characteristics with more precision to resolve this case. In modifying the language of the exemption, Congress obviously did not

intend to grant to any person the right to wear a military uniform in any place whenever he chooses, as did the petitioner here, to "play" a soldier. Such a grant would have frustrated the basic purpose of protecting the "good repute and dignity" of the uniform by allowing any civilian to wear the military uniform or its distinctive parts for any purpose that the wearer claimed to be "theatrical".

2. Under the construction of the statute that we have urged, petitioner's conduct plainly did not qualify, as a matter of law, for the statutory exemption for theatrical productions. The skit was an intermittent event in a demonstration in the street in front of an induction station that also included picketing and distributing leaflets. In no sense could the skit be described as a "theatrical * * * production" as that phrase is used in the statute. There was neither a defined area for the actors equivalent to a stage or a defined area for an audience apprised that petitioner was merely a civilian demonstrator dressed as a soldier and not a member of the army. Pedestrians and motorists who either stopped or passed by the demonstration could reasonably believe that petitioner was in fact a soldier, as his wearing of distinctive parts of the uniform was intended to convey.

As discussed above, a civilian has no First Amendment right to wear the uniform to picket or carry a sign merely because his right to picket might be protected from other types of regulation. Hi-jinx in the streets, in a place not cordoned off to make the area the substantial equivalent of a theater, in order to get the attention of passers-by is conduct which has all

the elements of picketing and no real similarity to the "theatrical production" which Congress contemplated. Petitioner's argument that his routine was a "play" and that a "play" must be comprised within the term "theatrical * * * production" is a perfect illustration of the illogic of which Mr. Justice Holmes warned in *Guy* v. *Donald*, 203 U.S. 399, 406: "As long as the matter to be considered is debated in artificial terms there is danger of being led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the grounds on which the name was applied."

IV. SINCE PETITIONER'S CONDUCT DOES NOT QUALIFY, AS A MATTER OF LAW, FOR THE EXEMPTION FOR ACTORS IN A THEATRICAL PRODUCTION, IT WAS AT MOST HARMLESS ERROR TO CHARGE THE JURY THAT PETITIONER COULD BE ACQUITTED UNDER THE EXEMPTION, BUT ONLY IF HIS PERFORMANCE DID NOT TEND TO DISCREDIT THE ARMY

The final question in this case is presented by petitioner's contention that the limiting language in 10 U.S.C. 772(f), making the exemption for theatrical productions applicable only "if the portrayal does not tend to discredit [the] armed force", is violative of the First Amendment. Petitioner is correct in asserting that this limitation does constitute an indirect regulation of the content of the production, and this raises an issue as to whether the condition is constitutional. In support of the statutory limitation it may be argued that such a qualification on the exemption is justified by some of the legitimate govern-

mental concerns for preserving dignity and respect for the uniform which underlie the general prohibition against unauthorized wearing of the uniform. And it should be pointed out that in this case, unlike the cases on which petitioner relies (*e.g., Shuttlesworth* v. *Birmingham,* 394 U.S. 147), the challenged provision is not part of the prohibitory language of the statute but appears in a separate—and severable—exemption which petitioner seeks to employ notwithstanding his deliberate disregard of the limitation. Unless the exemption for theatrical productions is constitutionally necessary, it could be argued that this limitation—which ordinarily would have a minimal, and avoidable, impact on the content of the drama—is a reasonable condition on an exemption which the individual must accept according to its terms. Against those arguments, however, petitioner may invoke the principle established by decisions of this Court that the government may not condition or withhold the granting even of gratuitous benefits on grounds which inhibit the exercise of First Amendment rights. See, *e.g., Speiser* v. *Randall,* 357 U.S. 513, 518–519; *Sherbert* v. *Verner,* 374 U.S. 398, 404–405; *Shapiro* v. *Thompson,* 394 U.S. 618, 627; Note, 73 Harv. L. Rev. 1595, 1600–1602 (1960).

In light of the position developed in the preceding sections, however, we believe that the Court need not reach the question of the validity of the limitation in 10 U.S.C. 772(f). Although the trial court, in giving an instruction based on that statute, charged the jury that petitioner must be acquitted if it found that he

wore parts of an Army uniform in a theatrical production if his performance did not tend to discredit the Army, any error in thus limiting the exemption does not call for reversal. As we have shown above petitioner had no right to an instruction based upon 10 U.S.C. 772(f) because, as a matter of law, the jury could not find that he was an actor in a theatrical production. He received the instruction giving him this defense only after the trial judge had expressed doubt whether there was any occasion for such an instruction.[12] Petitioner thus received the benefit of a defense to which he was not entitled. In other circumstances, where a trial court has given a defendant an improper advantage in its instructions, including an extra defense, the courts have concluded that any error in such instructions is not prejudicial. See, *e.g., Sylvia* v. *United States,* 312 F. 2d 145 (C.A. 1), certiorari denied, 374 U.S. 809; See also *Killian* v. *United States,* 368 U.S. 231, 257–258; *Lopez* v. *United States,* 373 U.S. 427, 435–436; *Ebeling* v. *United States,* 248 F. 2d 429, 438 (C.A. 8), certiorari denied *sub nom. Emerling* v. *United States,* 355 U.S. 907.

[12] The judge said that he thought there was a difference between a theatrical performance and a theatrical production (R. 209).

CONCLUSION

For the reasons set forth in Part I, *supra,* the writ of certiorari should be dismissed for lack of jurisdiction. If the Court concludes that it does have jurisdiction, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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